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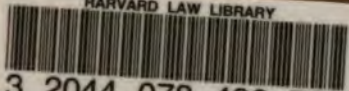
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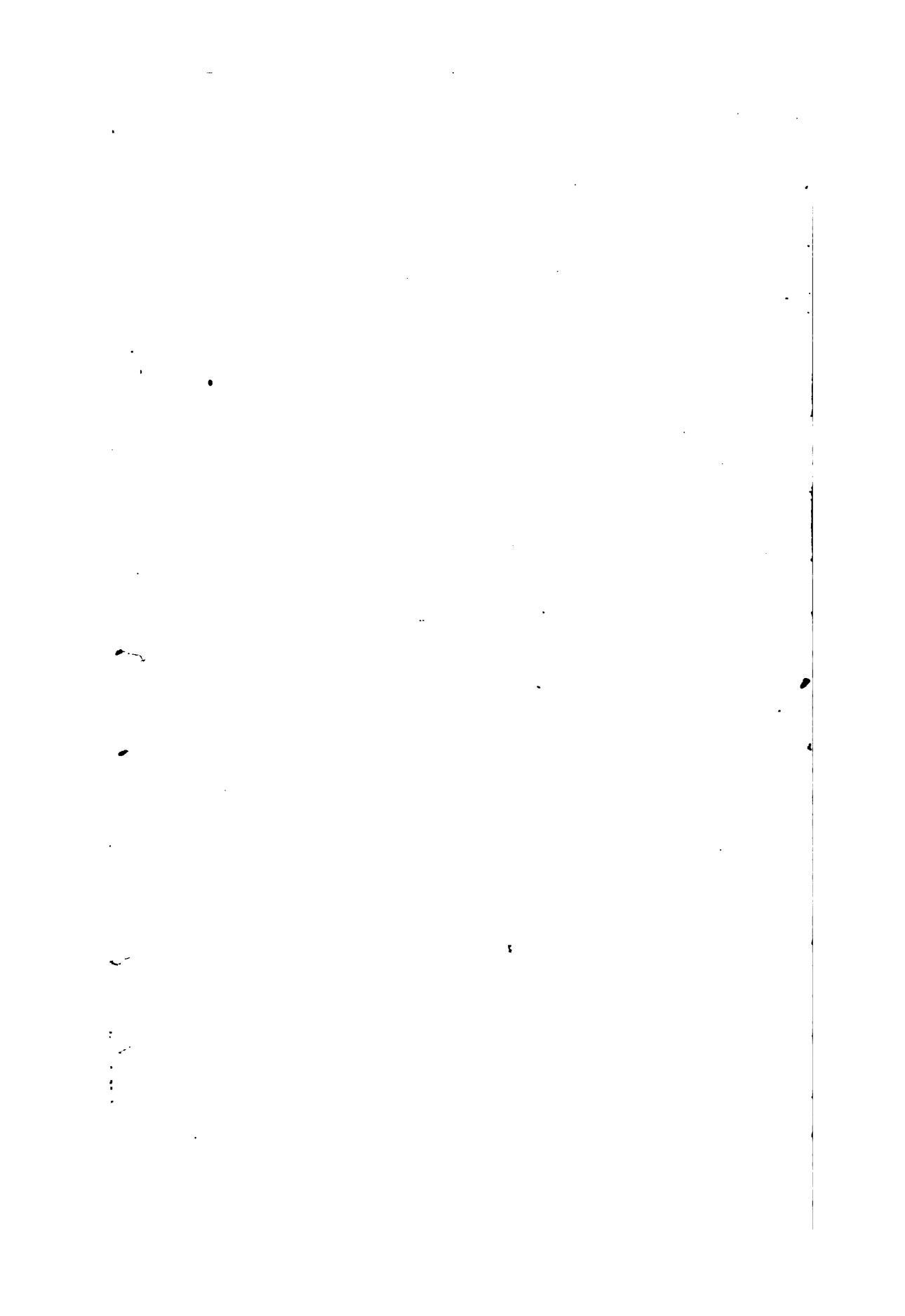
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OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 79,
CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
1881, NOT REPORTED IN VOLS. 76, 77, AND 78.

INDIANAPOLIS:
CARLON & HOLLENBECK, PRINTERS AND BINDERS.
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.*†
HON. JAMES L. WORDEN.‡
HON. WILLIAM A. WOODS.†
HON. WILLIAM E. NIBLACK.‡
HON. GEORGE V. HOWK.‡

* Chief Justice at the November Term, 1881.

† Term of office commenced January 3d, 1881.

‡ Term of office commenced January 1st, 1877.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA.

HON. GEORGE A. BICKNELL.*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. HORATIO C. NEWCOMB.†

HON. JAMES I. BEST.†

*Chief Commissioner.

†Appointed April 27th, 1881.

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OFFICERS
OF THE
SUPREME COURT.

CLERK,
JONATHAN W. GORDON.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
FREDERICK HEINER.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1881, IN THE SIXTY-
SIXTH YEAR OF THE STATE.

No. 8957.

CARTMEL v. NEWTON.

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PRINCIPAL AND SURETY.—*Contract for Extension of Time.*—The assent of a surety that the creditor may give time to the principal, upon condition that the latter will perform certain stipulations within a definite time, must, as to time, be performed by the principal strictly according to its letter, or the surety will be discharged.

SAME.—*Construction of Contract.*—*Discharge of Surety.*—A surety consented in writing that upon the principal securing to the creditor in a certain manner, within ten days, one-fourth of the indebtedness, the creditor might discharge him from the whole debt, and hold the surety for the remainder. The principal assented to the terms proposed within ten days, but did not give the securities provided for until afterwards.

Held, that, on behalf of the surety, time was of the essence of the contract, and he was therefore wholly discharged.

CONTRACT.—*Modification.*—*Acceptance.*—In order to constitute a contract, it is essential that the proposition of one party should be assented to by the other, exactly as made. A modified acceptance can not make a valid contract until the one who makes the proposition assents to the modification asked by the other.

From the Shelby Circuit Court.

T. B. Adams and *L. T. Michener*, for appellant.

B. F. Love and *H. C. Morrison*, for appellee.

Cartmel v. Newton.

ELLIOTT, C. J.—Appellant and one Thomas N. Donnell were sued by the appellee upon a promissory note executed by them. The appellant's answer is in two paragraphs. The first alleges that appellant executed the note as surety for Donnell; that appellee had notice of that fact; that on the 17th day of April, 1876, he, with other creditors of Donnell, made the following proposition to him:

"We, the undersigned creditors of T. N. Donnell, of Shelby county, Indiana, in consideration of T. N. Donnell executing his notes, payable in six, twelve, eighteen and twenty-four months, and also the said T. N. Donnell and his wife executing a mortgage on the farm owned by said Donnell, in Shelby county, Indiana, consisting of (212) acres, and provided that at the time of executing of the mortgage there be no other incumbrance other than a mortgage now held by the North-Western Life Insurance Company for \$3,500.00 and interest to secure said notes, agree to accept in full of our respective claims against said Donnell, including as also on such claims that he may have entered himself as security for Bennett Powell, that the said Powell may be unable to pay, at the rate of twenty-five cents to the dollar; and to effect such arrangement we, the undersigned, do hereby appoint and select John Blessing and David Grubb to have such above terms carried out, and that said mortgage and notes can be executed to them for the benefit of the creditors, and that the same be carried out within the next ten days. April 17th, 1876." At this point are attached the signatures of the creditors. After the names of the creditors is written the following: "In consideration of my creditors having agreed to accept in full of their respective claims against me the per cent. as stated within, I agree to accept John Blessing and David Grubb as trustees for said creditors, and will immediately assist them in obtaining the correct amount of my indebtedness that I may be bound for as security, and to cause to be executed a mortgage signed by myself and wife over my land situate in Shelby county, Indiana, consisting of two hundred

Cartmel v. Newton.

and twelve acres; said land to be free from and clear of all incumbrances, except as to one mortgage of three thousand and five hundred dollars, and the interest thereon, given to North-Western Life Insurance Company, to secure four notes to be executed by me to said Blessing and Grubb, as trustees for said creditors, for the amount found to be payable by me according to the within article, and said notes to be payable in six, twelve, eighteen and twenty-four months, without interest. Said mortgage and notes as above specified to be executed and delivered to said Blessing and Grubb within three days after notification by said Blessing and Grubb. April 27th, 1876. T. N. DONNELL."

It is also averred that, to carry into execution this agreement, Grubb and Blessing were appointed trustees; that the trust was accepted by Blessing; that the notes and mortgage provided for in the agreement were executed; that afterwards, on the 19th day of May, 1876, the trustee, in discharge of the duties of his trust, accepted for the appellee and other creditors of Donnell, the notes and mortgage, without the consent of the appellant.

The second paragraph of the answer is substantially the same as the first. There are no facts stated in it which materially change the character of the defence.

The first paragraph of the appellee's reply admits that appellant was Donnell's surety, and alleges that after the note was executed, and while the principal was financially embarrassed and unable to pay his debts, appellee and other creditors executed the contract set forth in the answer; that it was agreed between appellant and the appellee that he should join with the other creditors of Donnell in the compromise contract; that appellant should remain liable upon the note for seventy-five per centum; that, as evidence of appellant's agreement to the contract between Donnell and his creditors, he affixed his signature to it under the style of Palmer Cartmel. The second paragraph of the reply is in all material respects the same as the first.

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The point first argued is the sufficiency of the reply.

It is stoutly maintained that the written contract to which appellant assented required the full performance of its stipulations within ten days from the 17th day of April, 1876, and that performance includes the execution of the notes and mortgage provided for in the written instrument. The limitation upon which appellant's counsel build their argument is expressed in these words: "And that the same be carried out within the next ten days. April 17th, 1876." To break the force of this argument the counsel for the appellee insist that the contract was carried out when Donnell executed it on the 27th day of April, 1876. The first proposition by which this general position is supported by counsel is, that the execution by Donnell was within ten days from the 17th of April, because both the 17th and 27th are not to be counted. Whether both days are to be counted in computing time in cases of contracts, is a question upon which there is much conflict. Mr. Bishop lays down the rule that one day only shall be counted, but the decisions of this court declare a different doctrine. *Brown v. Buzan*, 24 Ind. 194; *Tucker v. White*, 19 Ind. 253; Bishop Contracts, section 749.

It is held in *State, ex rel., v. Thorn*, 28 Ind. 306, that the statutory rule embodied in section 787 of the code of 1852 does not apply to contracts, so that we can not act upon the statutory rule in the present case. We do not find it necessary to decide whether, in computing time in cases of contracts, both the day of the promise and the day of the performance are to be included. We think the material and controlling question is, whether Donnell's assent to the proposition can be deemed to be "carrying out the same."

Contracts are to be construed according to the intention of the parties. The evident intention of the parties to the contract under examination was, that Donnell should perform the contract within ten days, by executing the notes and mortgage for which it made provision. The language employed forbids the inference that the parties meant assent and not perform-

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ance. To assent is one thing, to perform is another. Assent to a proposition creates, but does not "carry out," a contract. Without assent there is no contract, but assent is not performance. Until assent, there is no contract to perform. The words used in the clause quoted mean performance, not assent. "To carry out" a contract is more than the signing and delivery. Carrying out comes after the execution of the contract; it is performance. The contract entered into between Donnell and his creditors was not carried out by him within the time limited.

Appellee's counsel argue with much force that time was not of the essence of the contract, and that the rights of the contracting parties were not injuriously affected by the failure of Donnell to execute the notes and mortgage within the prescribed time. At law, time is of the essence of the contract. If a man contracts to perform an act within a given time, he must do it within the time limited. This is a long and well settled rule.

Equity takes a somewhat different view. It is the general rule in equity, that "time is not, in general, the essence of the contract, and may, in a court of equity, under certain circumstances, be disregarded." Willard Eq. Juris. 293. The rule is somewhat differently stated by Judge STORY, who says: "Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract." 1 Story Eq. Jur., sec. 776. This doctrine has received the approval of this court. *Brumfield v. Palmer*, 7 Blackf. 227; *Ewing v. Crouse*, 6 Ind. 312; *Day v. Patterson*, 18 Ind. 114. The general rule is, it will be observed, stated in guarded terms. The soundness of the rule itself has been doubted by able lawyers. It is, at all events, a rule to be stated with care and applied with caution. If not, there is danger of courts making, rather than enforcing, contracts. The reason for the rule shows the necessity of applying it with scrupulous care.

The author from whom we first quoted says: "A court of equity, in holding that time is not of the essence of a con-

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tract, proceeds upon the principle that, having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretence or evasion." While the general rule is as stated, it is true that it can not prevail where the parties, by their conduct or their contract, have made time essential. In *Ewing v. Crouse*, *supra*, the court quoted with approval the statement: "But where it necessarily follows from the nature and circumstances of the contract, that the parties intended to stipulate for a particular thing to be done at a particular time, such a stipulation should, even in a court of equity, be carried literally into effect." Said Baron ALDERSON, in *Hipwell v. Knight*, 1 Y. & Col. 401:

"After examining with as much attention as I can the various cases brought before me during the argument, it seems to me to be the result of them all that a court of equity is to be governed by this principle—it is to examine the contract, not merely as a court of law does, to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect. But in so doing, I should think it prudent, in the first place, to look carefully at what the parties have expressed, because, in general, they must be taken to express what they intend; and the burden ought, in good reason, to be thrown on those who assert the contrary."

The contract which we are here examining plainly requires that the acts of Donnell shall be performed within the time limited. This is as much an essential element of the contract as any other contained in it, and it would require a strong and extreme application of the equitable rule to set aside this express stipulation of the parties. But there are other circumstances which require our attention. The relationship which the appellant occupied is to be considered. As the surety of Donnell, he had a right to stand upon the strict letter of his contract. As a surety, he had a right to require his creditor to refrain from fettering himself by a covenant not to sue, or by an agreement for the extension of time. It

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may well be, that, to a surety situated as was the appellant, time was of the essence of the contract to which he became a party. Important rights were yielded by him. Is it for the courts to say that the consideration of time was not as essential to him as was any other part of the contract? Shall the courts say that a condition concerning the time of performance, which was written in the contract into which the surety entered, was not essential? It is difficult, if not impossible, to find any solid ground upon which to disregard the express stipulation of this contract respecting the time of performance. The appellant, as the surety of the debtor, who, by the composition with his creditors, was to secure a discharge, had a right to make it a condition of his assent that the debtor should perform the contract within a designated time. It must be kept in mind that the effect of this contract was to let the principal debtor go "scot free" upon the payment of a small portion of the debt, and to hold the surety for the remainder. If ever there was a case where a surety might assert his right to stand upon the letter of his contract, this surely is one.

Considering the relationship of the appellant, the circumstances surrounding the parties, and the language of the contract, it must be held that the parties, at least the appellant, intended that time should be of the essence of the contract. A recent writer, in the course of a discussion of this general subject, says: "Although, in ordinary cases, time is not essential, yet it may be, and is, essential whenever the intention of the parties, as shown by the contract, is clear that the performance of its terms should be accomplished punctually at the stipulated day; it is a matter of intention, and the intention must govern." Pomeroy Specific Performance, sec. 382.

Whether a change in a contract is or is not beneficial to a surety is not the subject of judicial enquiry. Courts will not attempt to determine whether a change in the terms of the contract will benefit or injure the surety. If it be shown that a change has been made without the consent of the surety, he

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may demand to be discharged. In the case before us the only contract to which the surety ever gave his assent was one providing that the principal should perform it within a designated period, and we can find no case which will warrant the conclusion that the creditor may suffer the time to be extended without the knowledge or consent of the surety. The rule in favor of granting the surety the full benefit of the letter of the contract ought not to be made to yield to the rule that time is not of the essence of the contract. Both of these rules can not be given force in a case like the present; one or the other must yield, and in our opinion it must be the latter. *Evans v. Gallantine*, 57 Ind. 367.

In order to constitute a contract, it is essential that the proposition of the one party should be assented to by the other, exactly as made. A contract is never created unless the minds of the parties agree upon one and the same thing. The proposition which the surety signed plainly and unequivocally required that the notes and mortgage provided for should be executed within ten days. This was a material ingredient of the proposition. The surety never signified his willingness to assent to any other contract. He did not become a party to any other. As the creditor chose to permit the principal to secure his release upon other terms than those to which the surety had assented, he has no right to enforce the claim against the latter.

The proposition in which the surety joined provided that the notes and mortgage should be executed within ten days from the 17th day of April. The assent made to that proposition on the 27th day of that month provided that the notes and mortgage should be executed within three days after notification. This was an essential modification of the proposition which the appellant joined in making. A modified acceptance of a proposition can not make a valid contract. The appellant was entitled to have his proposition accepted as he made it. A proposition is either accepted or rejected, and a modification is a rejection. Of course, the parties may subse-

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quently agree upon a modification of the original proposition ; but, until the person who makes the proposition assents to the modification asked by the party to whom the proposition is made, there is no contract. Until then there is no meeting of minds, which is always indispensably essential. The appellant's proposition not having been accepted, he was not a party to the contract which secured the discharge of his principal.

Other interesting questions are discussed, but we deem it unnecessary to prolong this opinion by considering them, as the judgment must be reversed for the error committed in overruling appellant's demurrers to the reply of the appellee.

Judgment reversed.

No. 9825.

THE STATE v. DOE.

CRIMINAL LAW.—*Dogs Not Subject of Larceny.—Common Law.*—There is neither at common law nor by the law of this State such a property in dogs as makes them the subject of larceny.

From the Huntington Circuit Court.

D. P. Baldwin, Attorney General, *C. W. Watkins*, Prosecuting Attorney, and *M. L. Spencer*, for the State.

B. F. Ibach and *B. M. Cobb*, for appellee.

WORDEN, J.—An indictment was found against the appellee in the court below, charging that the defendant, “on the 12th day of October, 1881, at,” etc., “did then and there unlawfully and feloniously steal, take and lead away two dogs, of the value of \$50, of the goods and chattels of George Stultz, contrary,” etc.

On motion of the defendant the indictment was quashed and the State excepted. The State brings the case here for a review of the decision below.

79	9
169	133

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It is claimed by the appellee that dogs are not the subject of felonious larceny, and therefore that the indictment was properly quashed. This position is controverted on the part of the State.

At common law, a dog was not the subject of larceny. A few references to elementary books may not be out of place.

In 1 Hale's Pleas of the Crown, 1st Am. ed., 512, it is said that "Larceny can not be committed in some things, whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass, in respect to the baseness of their nature, as mastiffs, spaniels, gray-hounds, blood-hounds, or of some things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, etc., or their whelps, or calves, because, tho reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, etc., made tame, which, tho wild by nature, serve for food."

Blackstone says: "As to those animals, which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the crime of stealing them amounts to larceny." 4 Bl. Com. 236.

Bishop says: "Of those of which there can be no larceny, though reclaimed, are mentioned dogs, cats, bears, foxes, apes, monkeys, polecats, ferrets, squirrels, parrots, singing-birds, martins and coons. Though animals of the latter class may, when reclaimed, have a recognized value, and the right of property in them be protected in civil jurisprudence, it is otherwise in criminal; on the ground, probably, that anciently they were deemed of no determinate worth, and thus was established a rule which the courts could not afterwards change." 2 Bishop Crim. Law, sec. 773.

There may be a property in dogs that will be protected by law. They may be valuable. Many noble animals of the species doubtless are, and so we may suppose are the whole

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host of "mongrel whelps of low degree," in the estimation of their owners. But this is not decisive of the question involved.

We have seen by the common-law authorities, that while dogs may have a value, and the owners may have a property in them which the law will protect, still they are not the subject of larceny. They are the subject of malicious trespass. *Kinsman v. The State*, 77 Ind. 132. This, however, does not settle the question. It does not follow that because a dog is the subject of malicious trespass, he is the subject of larceny. In *Parker v. Mise*, 27 Ala. 480, it was held that an action would lie for wrongfully shooting the plaintiff's dog; yet in the later case of *Ward v. The State*, 48 Ala. 161, while the correctness of the former decision was recognized, it was held, on common-law grounds, that larceny could not be committed of a dog.

In 2 Wharton Crim. Law, sec. 1755, it is said that, "as to all other animals which do not serve for food, such as dogs and ferrets, though tame and salable, or other creatures kept for whim and pleasure, stealing these does not amount to larceny at common law. It is otherwise, however, when they are taxed." Reference is made to the case of *People v. Maloney*, 1 Parker C. C. 593. See also *People v. Campbell*, 4 Parker C. C. 386.

If dogs were taxed in Indiana as other property, for revenue purposes, it would be a strong circumstance to show an intent on the part of the Legislature to abrogate the common-law rule, and make them the subjects of larceny like any other personal property. But, so far as we are advised, dogs have never been thus taxed.

A specific tax has been, from time to time, levied upon dogs, and, when collected, applied generally, if not always, to payment for sheep killed by them. See the statutes cited in the case of *Kinsman v. The State*, *supra*. See also as to dog fund, section 2651, R. S. 1881. This discrimination in the mode of taxing dogs shows that the Legislature did not intend to place them in all respects upon the footing of other personal prop-

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erty. The tax is levied *per capita* on the dogs, and not *ad valorem*. Dogs are not by these statutes recognized as subjects of general taxation for revenue purposes, and taxed accordingly. The object of the tax has been the non-production of dogs, rather than the production of revenue. Taxation for revenue must be uniform; based upon a just valuation of the property taxed. Constitution, art. 10, section 1.

These specific taxes upon dogs can be upheld only on the ground that they are not revenue measures, but police regulations. *Bright v. McCullough*, 27 Ind. 223; *Mitchell v. Williams*, 27 Ind. 62; *State v. Cornnall*, 27 Ind. 120; *Haller v. Sheridan*, 27 Ind. 494. In *Mitchell v. Williams*, *supra*, the court said: "That, as a measure of internal police, the Legislature has the power to encourage the rearing of sheep, and, with that object in view, to discourage the keeping of dogs, animals which are not even the subject of larceny at common law, can not be doubted." So far, therefore, as any inference can be drawn from the taxation of dogs, considering the character and purpose of the taxation, it is rather against than in favor of the theory that the Legislature intended to abrogate the common-law principle and make them the subject of larceny.

This brings us to considerations bearing more directly upon the question involved.

By section 1933, R. S. 1881, which took effect September 19th, 1881, it is made grand larceny to steal, etc., "the personal goods of another" of the value of twenty-five dollars or upwards, and the punishment is imprisonment in the State prison from one to fourteen years, fine and disfranchisement.

By section 1934 it is made petit larceny to steal, etc., "the personal goods of another" of the value of less than twenty-five dollars; and the punishment is imprisonment in the State prison from one to three years, fine and disfranchisement; or imprisonment in the county jail not more than a year, fine and disfranchisement.

These offences are both denominated felonies. Section 1573.

Now, in some sense and for some purposes, dogs may, doubt-

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less, be regarded as "personal goods." But the question is, did the Legislature intend, by the use of those words in defining grand and petit larceny, to include dogs? We are not left solely to the common-law principle, that dogs are not the subject of larceny, for an answer to this question. That principle, together with concurrent legislation, settles it conclusively.

By section 2647 of the same statutory revision it is provided, that any person who shall own or harbor any animal of the dog kind shall, on or before the first of April, 1882, and yearly thereafter, report to the proper township trustee the number of dogs owned or harbored by him, which exceed the age of six months; the trustee is to register and number the same, with a brief description of each dog, by sex, color and breed, and furnish the owner with a metallic tag, with number and year to correspond with register, which tag the owner is to attach to the neck of the dog by a collar; the owner is to pay one dollar for a male dog, two dollars for a female, and, if more than one dog is kept, two dollars for each additional dog.

By section 2648 it is made unlawful for any dog to run at large without collar and tag as provided for, and it is made lawful for any person to kill the same.

By section 2649 it is made the duty of the constables to "proceed to kill all dogs on and after the first day of April, 1882, which shall be found at any time thereafter without collar and tag as herein provided." The section contains also the following provision: "Any person who shall maliciously injure or kill, or any person who shall steal, take, and carry away any dog which has been duly registered and is wearing a metallic tag according to the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction, be fined in any sum not exceeding \$200, to which may be added imprisonment in the county jail for any term not exceeding thirty days."

It is thus seen that unregistered and untagged dogs are placed under the ban of outlawry. Every man may slay them

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when running at large, and it is made the duty of constables to do so when found.

It is made a misdemeanor to maliciously injure or kill, or to steal a registered and tagged dog.

In view of the common-law principle and this legislation, it is impossible to suppose that the Legislature intended by the words "personal goods," in defining grand and petit larceny, to include dogs.

The fact that the time has not yet come when dogs are required to be registered is of no importance to the question here involved. The intention of the Legislature in the several enactments is unmistakable.

The indictment was properly quashed.

The judgment below is affirmed.

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126	436

No. 8474.

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PLEADING.—*Copy of Writing.*—A writing which is not the foundation of the action or defence should not be copied into the complaint or answer, and, if so copied, it neither adds to nor takes from the force of the averments of the pleading.

TRESPASS.—*Answer of Title and Possession in Another.*—In an action for trespass on land, it is a good answer that the plaintiff had conveyed and given possession of the land to another, by whose authority the defendants did the acts complained of, the copy of the deed referred to being unnecessary and immaterial.

SAME.—*Conveyance.*—*Re-entry.*—The grantor in a conveyance upon a condition subsequent, after condition broken, must have re-entered and had possession at the time of an alleged trespass upon the land, in order to be entitled to an action therefor.

SAME.—*Grantor and Grantee.*—The mere assertion of ownership or control by a grantor, after breach of a condition subsequent in his deed, the grantee being still in the actual possession, does not constitute a re-entry and recovery of possession so as to enable the grantor to maintain an action of trespass.

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CONVEYANCE.—*Condition Subsequent.—Breach.*—A condition in a conveyance of land to a religious society, that it shall be “held so long as needed for meeting purposes, then to revert,” is not broken by the removal of the meeting-house onto adjacent ground, if the land so conveyed is still needed and intended to be used for any purpose connected with the meetings of the society.

INSTRUCTION.—*Harmless Error.*—Though under supposable facts, of which there was no evidence, an instruction was too broadly stated, yet if in reference to facts proved it could not have misled the jury, the error is harmless.

From the Hendricks Circuit Court.

E. F. Ritter, L. C. Walker, L. Ritter and J. V. Hadley, for appellant.

L. M. Campbell, for appellees.

WOODS, J.—The appellant sued the appellees, charging in his complaint “that for more than forty years last past he has been the owner in fee simple, and in possession, of the following described real estate” (the piece described being six by eight rods in size, and situate) “in Hendricks county, Indiana; that on the 3d day of January, 1878, the defendants, without right, unlawfully and maliciously entered upon said real estate and moved therefrom three frame buildings of the respective values of seven hundred dollars, two hundred dollars, and fifty dollars; that then and there the defendants also cut down and destroyed certain pine, cedar and forest trees standing upon said real estate, and dug up and excavated said real estate, on account of which acts the plaintiff has been damaged one thousand dollars, for which he asks judgment against the defendants.”

The defendants answered by general denials, and by a special plea (provable under the general denial), in substance, as follows:

“That the defendants, with other persons who are not made parties to this suit, on the day of , 1878, did enter upon said real estate and did remove therefrom certain frame buildings which had been erected thereon, being the buildings referred to in the complaint; but that the plaintiff ought not to have or maintain his action therefor, because they say,

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that on the 11th day of November, 1872, the plaintiff, together with his wife, Elizabeth, by their joint deed of that date (a copy of which is filed herewith), did then and there convey and warrant to Caleb Hunt and four others, named, as trustees of the Mill Creek Monthly Meeting of the Religious Society of Friends, and their successors, the real estate described in said complaint, the same being wholly unimproved; that said society, known by said name, was then and for a long time prior thereto, and continuously to the present time has been, acting, doing business and maintaining regular religious worship, as a religious corporation, as was well known to the plaintiff, and as such did erect on said real estate a building to be occupied as a house of worship, and such out-houses as were necessary to be had, adjacent thereto; that said society had purchased and owned another lot of land of the same size immediately adjoining that described in the complaint; that in the year 1878 the society, by resolution passed at a regular meeting thereof, appointed these defendants, with others, a committee to consider the propriety of removing said meeting-house and other buildings onto the adjoining lot, and, acting as agents and by the authority of said society, and not otherwise, they did remove said buildings a distance of five rods east from where they were erected and located the same on the said adjacent lot, believing this to be for the best interest of the society and better protection of said property, where the same buildings are, and have been regularly, since the removal, used and occupied for meeting purposes; that they did not otherwise enter upon said land or any part thereof, nor otherwise take or remove any building, trees or other property, nor did they enter upon any other lands than those described in the deed aforesaid."

The *habendum* of the deed referred to in this answer, as set forth in the copy filed, is of the tenor following, to wit: "To have and to hold for the use of said religious Society of Friends so long as it may be needed for meeting purposes; then said premises to fall back to the original tract."

The court overruled the appellant's demurrer to this answer, and whether this ruling was correct is the first point to be decided.

Counsel for the appellant contend that the land in question was held by said society upon a condition subsequent, expressed or implied in the clause above quoted from the deed, and that the proposed removal of the buildings, as set forth in the answer, constituted a breach of the condition, whereby the title was at once revested in the appellant, and that the act of removal was itself an actionable trespass.

Whether the society held its title subject to the condition stated, we need not decide. The proposition is certainly not clear. There is no explicit provision that the title shall in any event revert to the grantor in the deed. "Then said premises to fall back to the original tract," is the language used. It does not appear from the face of the deed, nor is it averred that the piece conveyed was carved out of a larger tract of which the grantor was owner; and, if that were conceded, it does not appear that the plaintiff is still the owner of the "original tract."

But, waiving such suggestions and the legal queries that arise out of them, it can not be said on the facts disclosed in the answer, that there was a breach of the alleged condition. The proposed removal of the buildings which the society had erected furnished no reason for a necessary inference that the land was not longer "needed for meeting purposes." It may have been intended to make room for new and better buildings, or the design may have been to put the old site of the buildings to some other useful purpose in connection with the old buildings in their new location. If only for the purpose of hitching horses and the like uses, while the people were attending meeting, it would seem to have been enough to prevent a forfeiture of the title. The answer shows that the plaintiff had conveyed away his alleged title and put the grantee in possession, and that, by authority of that grantee, yet in

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actual possession, the defendants did the things alleged against them ; and nothing appears from which it can be inferred that the possession of the society had become wrongful or its title forfeited. It necessarily follows that the answer is good.

It is proper to observe here, that the alleged deed is not the foundation of the defence ; it is only evidence of the title which is set up. It was therefore not proper to file a copy with the answer, and the averments of the plea are neither strengthened nor impaired by the exhibit. Considered without reference to the exhibit, the answer is entirely free from the objection which is made to it. The conveyance by the plaintiff of his title to the society is directly averred ; the possession of the society by virtue of the conveyance, and under it of the defendants, is fairly, if not necessarily, inferable from the other averments made, and there is nothing, from which it can be inferred that the title so conveyed was subject to any condition or limitation whatever.

It is argued at some length that the verdict is contrary to the law and the evidence. The force of the argument consists largely in the alleged breach of condition by reason of the proposition to remove the building. We need not add anything further on that subject.

It is next claimed that the court erred in giving and refusing instructions. The fourth instruction given was as follows :

"If you find from the evidence, that Ira Carter and wife deeded the real estate described in the complaint to the Mill Creek Monthly Meeting of the Religious Society of Friends, and said society erected buildings thereon and abandoned the same, and ceased to use and exercise any control over the same at any time before the alleged trespass, then you should find for the plaintiff against the defendants, that the evidence shows," etc.

The objection made to this instruction is that the court thereby declared in effect, "that any kind of use or control over said real estate would protect the defendants in this case." It is a sufficient answer to the objection, if otherwise well

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made, to say that there was no evidence given of any use or control of the property, prior to the alleged trespass, inconsistent with the purpose for which it was conveyed. There could, therefore, have come no harm to the appellant on account of the alleged inaccurate wording of the charge, which in other respects was certainly quite favorable to the appellant.

The first instruction asked by the appellant contains the proposition, that if the defendants entered upon the land held under said deed, and removed therefrom the buildings, without the plaintiff's consent, they were trespassers. This is palpably wrong. It leaves out of question who the defendants were, whether members of said society and acting for it, or whether they were strangers, committing a trespass against the society, instead of the plaintiff; in short, it ignores all inquiry whether the society had abandoned or forfeited its possession, and whether the plaintiff had re-entered and was holding the lawful possession when the alleged trespass was committed.

The second instruction asked was embraced in the fourth given.

The remaining instructions asked by the appellant go upon the theory that the moment the society determined to discontinue meeting upon the land in question and to remove the buildings therefrom, the title to the land reverted to the appellant, and that the subsequent removal of the buildings was a wrong against him.

If the deed were construed as meaning that the society must maintain its meeting-house upon the land described, and that it could not use this land in connection with a meeting-house situated near by it, and it were conceded that upon breach of the condition the title would revert to the plaintiff, still, in order to be entitled to recover, the plaintiff was bound to prove that he had made an actual re-entry upon the land, had recovered, and, as alleged in his complaint, was holding, the possession at the time the acts complained of were done. The evidence shows clearly that the society had maintained continuous and actual possession and was in control at the time of, and by its

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actual possession, the defendants did the things alleged against them ; and nothing appears from which it can be inferred that the possession of the society had become wrongful or its title forfeited. It necessarily follows that the answer is good.

It is proper to observe here, that the alleged deed is not the foundation of the defence ; it is only evidence of the title which is set up. It was therefore not proper to file a copy with the answer, and the averments of the plea are neither strengthened nor impaired by the exhibit. Considered without reference to the exhibit, the answer is entirely free from the objection which is made to it. The conveyance by the plaintiff of his title to the society is directly averred ; the possession of the society by virtue of the conveyance, and under it of the defendants, is fairly, if not necessarily, inferable from the other averments made, and there is nothing, from which it can be inferred that the title so conveyed was subject to any condition or limitation whatever.

It is argued at some length that the verdict is contrary to the law and the evidence. The force of the argument consists largely in the alleged breach of condition by reason of the proposition to remove the building. We need not add anything further on that subject.

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The objection made to this instruction is that the court thereby declared in effect, "that any kind of use or control over said real estate would protect the defendants in this case." It is a sufficient answer to the objection, if otherwise well

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made, to say that there was no evidence given of any use or control of the property, prior to the alleged trespass, inconsistent with the purpose for which it was conveyed. There could, therefore, have come no harm to the appellant on account of the alleged inaccurate wording of the charge, which in other respects was certainly quite favorable to the appellant.

The first instruction asked by the appellant contains the proposition, that if the defendants entered upon the land held under said deed, and removed therefrom the buildings, without the plaintiff's consent, they were trespassers. This is palpably wrong. It leaves out of question who the defendants were, whether members of said society and acting for it, or whether they were strangers, committing a trespass against the society, instead of the plaintiff; in short, it ignores all inquiry whether the society had abandoned or forfeited its possession, and whether the plaintiff had re-entered and was holding the lawful possession when the alleged trespass was committed.

The second instruction asked was embraced in the fourth given.

The remaining instructions asked by the appellant go upon the theory that the moment the society determined to discontinue meeting upon the land in question and to remove the buildings therefrom, the title to the land reverted to the appellant, and that the subsequent removal of the buildings was a wrong against him.

If the deed were construed as meaning that the society must maintain its meeting-house upon the land described, and that it could not use this land in connection with a meeting-house situated near by it, and it were conceded that upon breach of the condition the title would revert to the plaintiff, still, in order to be entitled to recover, the plaintiff was bound to prove that he had made an actual re-entry upon the land, had recovered, and, as alleged in his complaint, was holding, the possession at the time the acts complained of were done. The evidence shows clearly that the society had maintained continuous and actual possession and was in control at the time of, and by its

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agents itself did, the acts complained of. The fact, if it were a fact, that the plaintiff claimed and asserted ownership or control, or forbade the removal of the buildings before it was done or while being done, did not constitute such re-entry and recovery of possession as to enable him to maintain the action. See *Cross v. Carson*, 8 Blackf. 138; *Leach v. Leach*, 10 Ind. 271; *Scott v. Stipe*, 12 Ind. 74; *Barber v. Barber*, 21 Ind. 468; *Broker v. Scobey*, 56 Ind. 588.

We find no error in the record of which the appellant may justly complain. The judgment is therefore affirmed, with costs.

No. 9808.

PATE, EXECUTOR, ET AL. v. MOORE, ADM'R.

DECEDENTS' ESTATES.—Final Settlement.—Res Adjudicata.—After an estate has been adjudged finally settled, and the administrator therefore discharged, letters of administration *de bonis non* can not issue upon the same estate, while such final settlement remains unrevoked and in force, the matter being *res adjudicata*.

SAME.—Appeal Bond.—Supreme Court.—Section 2454, R. S. 1881, requiring an appeal bond, does not apply where an executor of another estate, as such, is the appellant, section 646 making a bond by him unnecessary.

From the Ohio Circuit Court.

A. C. Downey, G. E. Downey and S. R. Downey, for appellants.

J. B. Coles, for appellee.

NIBLACK, J.—On the 24th day of September, 1881, George I. Moore made an application in writing, verified by his affidavit, to the clerk of the Ohio Circuit Court for appointment as administrator *de bonis non* of the estate of Joseph M. Vance, deceased, late of Ohio county, representing that the said Vance had died intestate in that county in 1863, leaving a personal

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estate of the probable value of \$1,300; that one Hazelett E. Dodd was soon afterward appointed administrator of his estate; that at the June term, 1873, of the Ohio Circuit Court, the said Dodd was discharged from his trust as such administrator, leaving claims due the decedent, of the probable value of \$2,000, uncollected.

The clerk thereupon issued letters of administration *de bonis non* on the estate of Vance to the said Moore, who immediately gave bond and qualified as such administrator.

At the next term of the Ohio Circuit Court, which was the October term, 1881, the clerk reported his proceedings in the premises to that court.

When the clerk's report was presented, Peter S. Pate appeared and objected to the ratification and adoption of the letters of administration so issued to Moore, and, in support of his objection to the proceedings of the clerk, filed his affidavit alleging that he was the executor of the last will of William T. Pate, deceased; that while Dodd acted as the administrator of Vance's estate, that is to say, on the 25th day of June, 1873, he made final settlement of said estate, and his discharge from his trust as such administrator was only because he had made such final settlement; that the object of Moore in obtaining letters of administration *de bonis non*, on the estate of Vance, was to enable him to prosecute a pretended claim, in favor of that estate against the estate of William T. Pate in the hands of the affiant as executor as above stated, and to derive thereby certain advantages in the prosecution of such claim, which would not result to the heirs of Vance if such claim were prosecuted in their name.

Henry S. Pate united with Peter S. Pate in opposing the confirmation of the letters of administration to Moore, and filed an affidavit alleging that he was the owner of valuable real estate in said county of Ohio, of which Vance died seized; that said real estate had first been sold and conveyed by the guardian of the heirs of Vance, they being minors, to one John F. Pate, and by him afterward sold and conveyed to the

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affiant; that a reopening of the business and settlement of the estate of the said Vance would be unjust to him, the said Henry S. Pate, as it might render his said real estate liable to be sold to pay debts and charges against said estate.

The court overruled the objections thus urged, and confirmed the letters of administration issued as above to Moore. From that order of confirmation the said Peter S. Pate and Henry S. Pate have appealed to this court.

On behalf of the appellants, it is contended, that under the laws of this State, letters of administration *de bonis non* can not be issued on an estate after it has been fully administered upon, and adjudged to be finally settled by the proper court.

Section 18 of the act of 1881 concerning the settlement of decedents' estates, Acts 1881, p. 427 (R. S. 1881, sec. 2240), which was in force when the letters of administration were granted to the appellee in this case, provides that "if any executor, administrator with the will annexed, or administrator, shall die, resign, remove from the State, or his authority be revoked or superseded, the remaining executor or administrator shall complete the administration of the estate; but, if no such executor or administrator be remaining in the State, the proper clerk or court shall grant letters of administration, or of administration with the will annexed, to any person entitled thereto, under the same regulations as in case of issuing the original letters; and which administrator, or administrator with the will annexed, thus appointed *de bonis non*, shall have the same rights and be subject to the same liabilities as the executor or administrator first appointed."

This section embraces the only statutory provision for the appointment of an administrator *de bonis non* upon an estate, known to us, and evidently authorizes the appointment of such an administrator only in cases in which a vacancy occurs in the administration before the settlement of the estate is completed. By its terms, as well as by necessary implication, it has no reference to estates which have been already finally settled.

By section 116 of the act concerning decedents' estates,

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which was in force when the estate of Vance is alleged to have been finally settled, such final settlement was made conclusive on all parties interested in the estate, unless reopened within three years for mistake or fraud. 2 R. S. 1876, p. 537. The act of 1881 contains a similar provision. R. S. 1881, secs. 2402 and 2403.

It necessarily follows that so long as the final settlement of an estate remains unrevoked, and in full force, letters of administration *de bonis non* can not be issued on such estate, nor can any further administration upon such estate be permitted by any executor or administrator, however appointed.

In such a case all matters pertaining to the ordinary settlement of the estate are *res adjudicata*, and hence have relation only to a trust which has been fully discharged. *Parsons v. Milford*, 67 Ind. 489.

But it is argued on behalf of the appellee that the estate of Vance was not in fact finally settled.

The record of the alleged final settlement was not introduced in evidence in the court below and is consequently not before us.

The affidavit of Peter S. Pate averred that Dodd made final settlement of the estate and was discharged because of such final settlement. In this he was corroborated by the affidavit of Henry S. Pate.

We, therefore, assume for the purposes of this case, that the estate of Vance was, by the proper court, declared finally settled in June, 1873.

Neither one of the appellants executed an appeal bond as required by section 228 of the act of 1881, *supra*, and the appellee has for this reason moved to dismiss this appeal.

As Peter S. Pate appeared in this proceeding only in his fiduciary capacity, as executor of William T. Pate, he had the right, under section 646 of the code of 1881, to appeal without executing an appeal bond. As the interest in the subject-matter of the proceedings represented by him was separate

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and distinct, he might also have appealed under that section, without joining Henry S. Pate.

The judgment will, at all events, have to be reversed upon the appeal of Peter S. Pate in his fiduciary character, and under such circumstances we need not either enquire or decide whether Henry S. Pate was entitled to unite in the appeal without an appeal bond.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

79	24
125	303
79	24
136	179

No. 8901.

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REDEMPTION.—Execution.—Liens.—Statute Construed.—The law concerning the priority of liens, as it existed before the act of 1879, providing for the redemption of real estate from sheriff's sales (Acts 1879, p. 176), was not changed by that act.

SAME.—Sheriff's Sales.—Application of Proceeds.—The requirement of section 5 of the act of 1879, that upon a sheriff's sale, on behalf of a redemptioner, the proceeds shall be first applied to pay "the amount due for redemption," must be construed in connection with, and be controlled by, section 3 of said act, which positively preserves the priority of liens, so that though a second redemptioner must pay not only the redemption money paid by the first, with interest and costs, but also the debt, interest and costs, by virtue of which the latter was enabled to redeem, yet no priority for the latter sum would accrue over any older lien held by a creditor who had not redeemed, and the second redemptioner could not demand that the proceeds of his sale should be applied thereto in preference to such older lien.

SAME.—Mandate.—Mortgage and Judgment Liens.—A mortgage, being the oldest lien, was foreclosed, and the real estate sold, leaving a portion of the judgment unsatisfied. A., the holder of a judgment lien next in priority, redeemed, and from him B., a holder of a junior judgment lien, who paid the redemption money, interest and costs paid by A., and also the amount of A.'s judgment. B. then sued out an execution on his judgment, with the proper recital of the several redemptions. The sheriff, holding also an execution for the balance of the mortgage debt, sold in regular form upon B.'s execution, and the holder of the mortgage

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debt became the purchaser; he tendered to the sheriff, in cash, the amount of the original redemption money with interest and costs, which had been paid by B. on account of the first sale, and, for the residue of his bid, tendered his receipt to apply on his execution in the sheriff's hands, it being the oldest lien. The sheriff refused the receipt, as also to execute a deed or certificate of purchase to him.

Held, that a mandate should go against the sheriff, to compel him.

SHERIFF.—*Execution.*—*Application of Proceeds of Sale of Real Estate.*—When a sheriff holds several executions against the same party, issued upon judgments which are liens on real estate, the proceeds of sale of such real estate on any of such writs should be applied to the satisfaction of all, in the order of the priority of the liens.

From the Howard Circuit Court.

C. N. Pollard, J. F. Elliott and L. J. Kirkpatrick, for appellants.

R. Vaile and J. F. Vaile, for appellee.

Howk, J.—This suit was commenced by the appellee against the appellant to compel him, as the sheriff of Howard county, by mandate, to perform certain alleged official duties, which, the appellee averred, he had refused to perform. The appellant Duke filed his demurrer to the appellee's complaint for such mandate, upon the ground that it did not state facts sufficient to constitute a cause of action. Before any action was had on this demurrer, on the verified petition of Moses Rosenthal, Charles J. Kraus and Joseph Rosenthal, partners under the firm name of Rosenthal, Kraus & Co., they were admitted as defendants in appellee's action. Thereupon they also demurred to appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action. Before the court ruled upon either of the demurrers to the complaint, all the appellants filed what is called their cross complaint against the appellee. Thereafter the appellants' demurrers to appellee's complaint were overruled by the court, and to these rulings they excepted. The appellee then demurred to appellants' so called cross complaint for the want of sufficient facts therein, as alleged, to constitute a cause of action, which demurrer was sustained by the court, and to this decision the

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appellants excepted. They declined to amend their cross complaint or to plead further; and thereupon the court rendered judgment against them, for the appellee, for a peremptory mandate, as prayed for in his complaint.

From this judgment the appellants, the defendants below, have appealed to this court and have here assigned, as errors, the following decisions of the circuit court:

1. In overruling their demurrers to appellee's complaint; and
2. In sustaining appellee's demurrer to their cross complaint.

In his complaint the appellee alleged in substance, that, at the March term, 1879, of the Howard Circuit Court, Sarah Markland and others, by the consideration of said court, recovered a decree for the foreclosure of a certain mortgage executed by one Nathaniel J. Owings on certain real estate, particularly described, in Howard county; that afterward a copy of said decree was duly issued to the appellant Duke, as the sheriff of said county; that, by virtue of said writ, the said Duke, as such sheriff, after due advertisement, on April 7th, 1879, offered and sold the said real estate, at public auction, to one Amos A. Covalt, for the sum of \$2,205.95, that being the highest and best bid made therefor; that such sale satisfied so much of said mortgage debt as was then due and the costs then accrued, but that a large part of the mortgage debt, to wit, more than \$2,600 thereof, which was not then due, remained unsatisfied after said sale; that afterward, on August 23d, 1879, the said Sarah Markland and others assigned and transferred to the appellee, Beeson, all the instalments of said mortgage and decree thereafter to become due, which remained unsatisfied after the said sale, stating the amount of each instalment and the time it would become due; that each and all of the said instalments were a lien on said real estate from the date of said mortgage, to wit, October 1st, 1875, and were the first and oldest lien on said real estate, subject only to the certificate of sale issued by the sheriff, under said

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writ, to said Covalt; that afterward, on February 5th, 1880, one James F. Elliott, as assignee of Walker, Welsh & Co., then and there a junior judgment creditor of said Nathaniel J. Owings, having two judgments against said Owings which became liens on said real estate on October 3d, 1877, but junior to the said liens of the appellee, redeemed said real estate from the said sheriff's sale thereof, on April 7th, 1879, by paying to the clerk of said court, for the use of the purchaser at said sale, the sum of \$2,394.22, the principal and interest of the purchase-money; that afterward, on February 19th, 1880, the appellants Rosenthal, Kraus & Co., to obtain the benefit of the redemption so made by said Elliott, paid to the clerk for the use of said Elliott the said sum of \$2,394.22 and its accrued interest, and also the amount of Elliott's said judgments, making in all \$3,797 by them paid to obtain the benefit of said redemption; that the said Rosenthal, Kraus & Co. were then and there judgment creditors of said Owings, their lien bearing date October 4th, 1877, and being junior not only to appellee's claims, but also to the judgments of said Elliott, as assignee.

And the appellee averred, that afterward the said Rosenthal, Kraus & Co. sued out an execution on their judgment for the amount thereof, the execution further reciting the several amounts paid for redemption and for obtaining the benefit of such redemption, as above stated; that, by virtue of such execution, the appellant Duke, as such sheriff, duly advertised that he would sell said real estate, at public auction, on the 10th day of April, 1880; that, prior to and at the time of such sale, the appellee had in the hands of said sheriff a certified copy of the decree of foreclosure of said mortgage; that on said 10th day of April, 1880, the said Duke, as such sheriff, offered and sold the said real estate, at public auction, to the appellee, Beeson, for the sum of \$4,000, that being the highest and best bid made therefor; that, in payment of his said bid, the appellee then and there tendered to the appellant Duke, as such sheriff, the sum of \$2,650 in legal tender

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notes of the United States, that being the full amount of the original redemption money for said real estate, together with all accrued interest and costs, and including all claims then in said sheriff's hands, that were senior to or equal with the lien of the appellee's claims; and appellee further offered to receipt to said sheriff, on his said writ, for the sum of \$1,359.65, and then and there tendered to said sheriff such receipt in payment of the residue of his bid of \$4,000, to be applied on the appellee's writ then in said sheriff's hands, and then and there the oldest lien on said real estate, and demanded a deed for said real estate. But the appellee averred that the appellant Duke, as such sheriff, wrongfully refused to execute to appellee a certificate of sale or deed for said real estate, as by law required.

Wherefore the appellee asked that a mandate be issued against said sheriff commanding him on the payment of said \$2,650, and the receipting for such sum of \$1,359.65, to execute to appellee a conveyance of such real estate, in manner and form as required by law, and for other proper relief.

It is manifest, we think, from the allegations of appellee's complaint, that the question of its sufficiency depends for its proper decision upon the construction which must be given to the provisions of an act, approved March 31st, 1879, entitled "An act providing for the redemption of real property or any interest therein sold on execution or decree of sale, and providing for deeds of conveyance in such cases." Acts of 1879, p. 176. This act contained an emergency clause or section, and, therefore, it took effect and became a law from and after the date of its approval. It was the law of this State at the time of the first sale of the real estate of Nathaniel J. Owings, as alleged in appellee's complaint, and it remained in full force during all the proceedings stated in the complaint, and until the redemption act of April 11th, 1881, took effect, on the 19th day of September, 1881. In section 13 of this latter act (section 778, R. S. 1881), it is expressly declared that "The provisions of this act shall not apply to

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any sale on execution or decretal order made before the taking effect of this act; but all liens and rights of redemption and re-sale, existing at the passage of this act and growing out of any such sale, may be enforced in like manner as if this act had not been passed, and in accordance with the statute in force when such sale was made."

It follows, therefore, that, in determining the question of the sufficiency of the appellee's complaint in the case at bar, we must be governed by the provisions of the above entitled act of March 31st, 1879, and of the prior legislation of this State on the subject of said act, in no manner repealed thereby. There is no repealing clause or section in the act of March 31st, 1879, and if it repeals any prior legislation on the subject of the act, it is not an express repeal, but wholly a repeal by implication. Under the provisions of the redemption act of June 4th, 1861, substantially the same question as the one presented by appellee's complaint, in the case now before us, was considered and decided by this court in a number of cases. Thus, in *The State, ex rel. Allen, v. Sherill*, 34 Ind. 57, it was held in substance, that where land sold on execution for less than the amount of the judgment on which the execution was issued is redeemed by the judgment defendant, the priority of the lien of such judgment for the residue thereof, over other judgment liens, would continue as if such sale had not been made. In *Greene v. Doane*, 57 Ind. 186, where land had been sold under a judgment for the foreclosure of a mortgage, and at such sale a third person had become the purchaser for a part only of such judgment, leaving a balance due thereon, it was held that such judgment creditor might redeem the land from such sale thereof. In *Cauthorn v. The Indianapolis, etc., Railroad Co.*, 58 Ind. 14, it appeared that certain real estate, sold at sheriff's sale in part satisfaction of a judgment foreclosing a prior mortgage, leaving a balance due thereon, had been redeemed from such sale by a purchaser thereof at a sheriff's sale under a junior judgment, and it was held that such real estate might be sold to satisfy

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the unpaid balance of the mortgage judgment, notwithstanding the fact that, at the time of the last sale, the judgment debtor had other property subject to execution.

The question under consideration was before this court also in the later cases of *Teal v. Hinchman*, 69 Ind. 379, and of *Smith v. Moore*, 73 Ind. 388. In both of these cases, there had been sales under judgments of foreclosure of the mortgaged premises, for sums much less than the mortgage judgments; and from these sales thereof the premises had been redeemed, in both cases, under the redemption act of June 4th, 1861. In each of the cases, the point was made and pressed with much earnestness, that, by reason of the sheriff's sale of the mortgaged premises, under the judgment of foreclosure, the mortgage and the judgment thereon became *functus officio* as to the mortgaged property, and that the same was thereby discharged from, and divested of, the lien of the mortgage and of the judgment of foreclosure, notwithstanding the redemption of the property from such sale thereof. In considering the point thus made, in the cases cited, this court said: "The effect of such redemption was to vacate and set aside the said sheriff's sale of the mortgaged property, and thereafter both the mortgage and the judgment of foreclosure stood precisely as they would have done, so far as the property was concerned, if no sale thereof by the sheriff had ever been made. * * * In such a case, the mortgaged property will remain a security for the unpaid balance of the mortgage debt and costs, and the judgment creditor may enforce the collection thereof by suing out an *alias* order of sale on his judgment of foreclosure, and by causing a resale by the sheriff of the mortgaged premises, as often as there may be a redemption of and from the previous sale thereof, in the mode, and within the time, prescribed by law for such redemption, and until the mortgage debt, interest and costs have been fully paid and satisfied." *Smith v. Moore*, *supra*, on page 395.

Thus the law was construed and declared by this court, upon the subject now under consideration, prior to the taking

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effect of the above entitled act of March 31st, 1879. The question remains, and this is the question for decision in the case now before us, Do the provisions of the act of March 31st, 1879, "change in any manner the priority of liens obtained or held by any of the creditors," as such priority existed under the law in force at or before the taking effect of said act? We are of the opinion that the pre-existing priorities of liens are expressly saved and preserved by the provisions of the act now under consideration. The lien of a judgment upon the lands of the judgment debtor is, without doubt, the creature of the statute, and is not dependent in any manner upon the contract of the parties. It begins, continues and terminates at the will of the Legislature. *Gimbel v. Stolle*, 59 Ind. 446; *Houston v. Houston*, 67 Ind. 276. This being conceded, as we think it must be, it follows of necessity that the priorities and other incidents of judgment liens are proper subjects of legislation, and may be modified, changed, or entirely taken away, at the will of the law-making power. But the question for decision in this case is not what might have been done, but what, if anything, actually was done in changing the priorities of judgment liens, by the above entitled act of March 31st, 1879?

Section 1 of this act merely prescribes and declares the respective rights and liabilities of the purchaser of land at sheriff's sale, and of the owner of the land prior to such sale, or of the occupant of the land during the year allowed by the act for redemption from such sale.

Section 2 of the act provides for the redemption of land, sold at sheriff's sale, "by the judgment defendant, or by his executor or administrator * * * or by any person who has the title of the judgment defendant," and prescribes the time, mode and terms for making such redemption.

Section 3 of the act reads as follows: "Before any of the persons named in the second section of this act shall have redeemed, any judgment creditor having a lien, or a mortgagee, whose mortgage, at the time of his redemption, shall have

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been recorded, may redeem the property sold by paying to the clerk, for the use of the purchaser, his purchase-money, with ten per cent. interest; or, if any such creditor shall have redeemed, then by paying to the clerk, for the use of the last redemptioner, his redemption money with interest as aforesaid, and the costs of the redemption, and also the debt, interest and costs on account of which the prior redemption shall have been made. When there are several creditors or mortgagees entitled to redeem, the creditor having the senior lien, subsequent to the one for which the sale was made, shall have the preference to redeem during the first thirty days after the sale, and the other judgment creditors or mortgagees shall each have preference to redeem during a like time, in the order of seniority of their respective liens. In case of equal liens, the one first redeeming shall have the preference. If none of them redeem within the thirty days herein allowed to each, then all of them shall be deemed to be equal as to the right of redemption, but nothing herein contained shall be construed to change in any manner the priority of liens obtained or held by any of the creditors; and any of them may redeem, and successive redemptions may be made, one from another, as aforesaid; but no redemption shall in any case, under the provisions of this act, be allowed after the expiration of twelve (12) months from the sale. In all cases of redemption, the clerk shall issue to the person redeeming a certificate thereof."

Section 4 of the act has no bearing upon any question in this case.

Section 5 provides as follows: "When the judgment creditor shall have redeemed the property sold, he may sue out an execution on his judgment, and shall direct the clerk to and the clerk shall recite in the execution, in addition to the recitals now required, the judgment on which the sale shall have been made, the sale aforesaid, the redemption or redemptions, the several amounts paid on redemption, and the dates thereof. The sheriff or other officer executing such writ shall proceed first to levy on and sell the property redeemed as he proceeds

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in other cases, and the person suing out such writ shall, at the sale under the same, be considered as a bidder for his redemption money, with ten per cent. interest thereon, and all costs accrued since the redemption, and if neither he nor any other person bid more, he shall be deemed the purchaser for that sum, and from the proceeds of sale shall be first paid the amount due for redemption. * * * The title acquired under such sale shall take effect as if there had been no redemption, and if there be no redemption from the sale under such writ, the conveyance made in pursuance thereof shall have effect as if it had been made in pursuance of the first sale: *Provided*, That any person hereby entitled to redeem, may redeem from such sale as herein provided, but only within twelve (12) months from the first sale."

The other sections of the act have no reference to, nor bearing upon, the questions for decision in the case now before us, and therefore we need not set them out, or even state their substance.

It must be confessed, we think, that the provisions of the act do not define very clearly the relative rights of the second or subsequent redemptioner, as the statute calls him, of land sold at sheriff's sale, and of the holder of a prior lien thereon, in the proceeds of the sale of such land, by virtue of the execution sued out by such second or subsequent redemptioner. It will be seen, by applying the provisions of section 3, above quoted, to the case stated in appellee's complaint in the case at bar, that after James F. Elliott redeemed the Owings' land from the first sale thereof by the sheriff, the appellants Rosenthal, Kraus & Co., as junior judgment creditors of Owings, for the purpose of redeeming the land from Elliott, were required to pay the clerk, for Elliott's use, not only his redemption money, with ten per cent. interest thereon, and the costs of the redemption, but also the amount of the Elliott judgments, interest and costs, to wit, the sum of \$1,402.78, on account of which Elliott had first redeemed the land. After

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their redemption of the land from Elliott's redemption thereof, as provided in said section 3, the appellants Rosenthal, Kraus & Co., sued out an execution on their judgment against Owings, in which execution the clerk recited, in addition to the ordinary recitals therein, "the several amounts paid on redemption, and the dates thereof," as required by section 5, above quoted, of the above entitled act. Under and by virtue of this execution, the appellant Duke, as sheriff, advertised and sold the redeemed land, on April 10th, 1880, to the appellee for the sum of \$4,000, that being the highest and best bid made therefor. Before and at the time of this sale, the appellant Duke, as such sheriff, had in his hands for collection an *alias* execution or order of sale, issued on the judgment or decree rendered by the court below, at its March term, 1879, against the said Nathaniel J. Owings, and in favor of Sarah Markland and others, and by them assigned to the appellee. This judgment or decree was rendered about six months prior to the rendition of the judgments in favor of the redemptioners, and was, therefore, by law the older lien on the Owings land. Besides this, the judgment or decree was rendered upon a mortgage dated October 1st, 1875, the lien of which, therefore, by contract, antedated the lien of the judgments of the redemptioners more than four years.

It was expressly provided, in section 5, above quoted, of the statute, that, under an execution issued in pursuance thereof, "from the proceeds of sale shall be first paid the amount due for redemption." But this provision of the statute, as it seems to us, must be construed in connection with, and is controlled by, the positive declaration in the 3d section of the act, that "nothing herein contained shall be construed to change in any manner the priority of liens obtained or held by any of the creditors." Thus construed, it is very clear that the lien of the appellee's writ, issued for the unpaid balance of the judgment or decree assigned to him by Sarah Markland and others, came next in priority after the lien of the

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original redemption money, paid by Elliott in redemption of the land from the sheriff's sale thereof to Amos A. Covalt, with ten per cent. interest thereon, and before the lien of the money paid by the appellants Rosenthal, Kraus & Co., on account of the two judgments held by Elliott against Owings, with interest and costs, in redemption of the land from Elliott's redemption. Such being the priority of these several liens, and the act of March 31st, 1879, having made no change in their priority, we are of the opinion that it became and was the duty of the appellant Duke, as such sheriff, to apply the proceeds of the sale of the land to appellee on these several liens, in the order of their priority, as demanded by appellee in his complaint. In *Steele v. Hanna*, 8 Blackf. 326, this court said: "The purchase-money for the sale on execution by the sheriff, of lands thus subject to judgment liens when executions are in his hands upon all of them, should be applied to the satisfaction of those liens in the order of their priority; and this, whether the sale be nominally on the execution on the older, or on the executions on all of said judgments." Again, in *The State, ex rel., v. Salyers*, 19 Ind. 432, the court said: "Each of the judgments became a lien upon the real estate of the defendants therein, from the date of the rendition thereof; and there is no doubt that the money made on the sales should have been applied on the several judgments, in the order of their seniority; paying the oldest judgment first, and so on until the moneys were exhausted. *Steele v. Hanna*, 8 Blackf. 326. *Harrison v. Stipp*, *id.* 455. *McMahon v. Thompson*, 2 Ind. 114. *Peck v. Tiffany*, 2 Comst. 451. The executions were all in the hands of the sheriff at the time of the sale, and it was wholly immaterial upon whose execution the sales were made, the money should have been applied as above indicated. *Rogers v. Edmunds*, 6 N. H. 70." See, also, on this point, the cases of *West v. Shryer*, 29 Ind. 624, and of *The State, ex rel. Sage, v. Prime*, 54 Ind. 450.

It was the duty of the appellant Duke, as such sheriff, upon

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such payment and application as aforesaid of the proceeds of the sale to appellee, under the provisions of section 5, above quoted, as, at the time of such sale, more than "twelve months from the first sale" had elapsed, to have executed a conveyance of the land to the appellee. It was alleged in the complaint, that the appellant Duke had refused to perform his official duties, as such sheriff, under the law, both in refusing to make the proper application of the proceeds of the sale, and in refusing to execute to the appellee a conveyance of the land, upon his reasonable request. In such a case the appellee's proper remedy was an application for a mandate to compel the appellant Duke to perform his official duties in the premises. *Jessup v. Carey*, 61 Ind. 584. The appellee's complaint was sufficient in substance to withstand the appellants' demurrers thereto for the want of facts; and no objection was made below, nor has any been made in this court, to the informality of the complaint or of the proceedings had thereon.

There is no material difference between the facts of this case, as stated in appellee's complaint, and the facts alleged by the appellants in their cross complaint. The only difference between the complaint and cross complaint, besides the different phraseology in which the same facts are stated, lies in their respective prayers for relief. As we have reached the conclusion that the appellee's complaint stated facts sufficient to constitute a cause of action, in his behalf, entitling him to the relief he demanded, we must hold of necessity that the appellants' cross complaint did not state a cause of action in their favor, and that the appellee's demurrer thereto was correctly sustained.

We have found no error in the record of this cause which would authorize or justify the reversal of the judgment below.

The judgment is affirmed, at the appellants' costs.

Carter et al. v. Compton et al., Ex'rs.

No. 8736.

CARTER ET AL. v. COMPTON ET AL., EX'RS.

79 37
165 200

JUDGMENT.—Set-Off.—Decedents' Estates.—T. obtained a judgment of allowance against the estate of S. for the amount of a note. The executors of S. held a note of later date against T., who was insolvent, executed to them in their representative capacity, upon which they obtained judgment. T., having in the mean time assigned his judgment, as collateral security, to C., who had notice of all the facts, died.

Held, that the executors of S. might, on motion, obtain a set-off of the judgment held by them against the judgment of allowance made to T.

From the Clay Circuit Court.

W. W. Carter and *S. D. Coffey*, for appellants.

G. A. Knight, C. H. Knight, I. M. Compton and *S. M. McGregor*, for appellees.

NEWCOMB, C.—The appellees, as executors of the last will, etc., of Benjamin Shattuck, filed their written motion to set off a judgment they had obtained as such executors, in the Clay Circuit Court, against Jacob Thomas, in satisfaction of a judgment previously rendered against them as such executors, in the same court and in favor of said Thomas. The defendants to the motion were Jacob Thomas and the appellant Carter. During the pendency of the proceedings Thomas died, and his administrators were made defendants in his stead. Said administrators made no defence and were defaulted, but have joined in the assignment of errors in this court.

The court, after hearing the evidence, sustained the motion of the appellees and rendered judgment accordingly. The defendant Carter moved for a new trial, on the grounds that the finding was not sustained by sufficient evidence, and was contrary to law. This motion was overruled. The defendant excepted and has brought up the evidence by a bill of exceptions.

The errors assigned are:

1. That the motion does not state facts sufficient to constitute a cause of action.
2. That the court erred in overruling the motion of the appellant Carter for a new trial.

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3. That the court erred in setting off the judgment in favor of the executors of Shattuck against the judgment rendered in favor of Thomas.

The written motion contained a brief statement of the two judgments and of the notes on which they were respectively rendered, and averred that before the executors commenced suit on the note executed to them by Thomas, the latter assigned his judgment to the defendant Carter, as collateral security; that Carter took said assignment with full knowledge of Thomas' indebtedness to said executors, and that the latter were about to bring an action thereon, and that the estate of Shattuck was solvent, but that Thomas, at the time of the assignment of the judgment and at the filing of said motion, was insolvent. If the appellees were entitled to have one judgment set off against the other, the written motion was a sufficient cause of action; but, as all the facts appear in the evidence, we will confine our discussion to the law arising upon the facts, none of which are controverted. Briefly, the facts are as follows:

On December 24th, 1864, the decedent, Shattuck, and H. L. Ashley, executed their note to Thomas, payable one year after date, for \$300. In May, 1878, Thomas brought suit on said note, and obtained judgment for \$308 thereon, January 25th, 1879, against said executors only, to be paid out of the assets in their hands to be administered. Ashley had been discharged in bankruptcy, and there was no judgment against him. This judgment was assigned to Carter, March 3d, 1879.

January 1st, 1876, Thomas executed his note to said executors, in their representative character, for \$253, due one year after date. Suit was commenced on this note August 16th, 1879, and judgment was rendered thereon in favor of said executors, November 6th, 1879. The motion of set-off was filed two days after the entry of said judgment.

In addition to the record evidence, it was admitted on the trial by the defendant Carter, that, at the time of the assignment of said judgment to him by Thomas, said executors,

Compton and McDougal, had no notice of said assignment; that at the time Carter took said assignment he knew that said executors held the note against Thomas, on which they subsequently recovered said judgment; that Carter held said assigned judgment as collateral security only; that the estate of said Shattuck was perfectly solvent, and that said Thomas was at the time of said assignment, and still was, wholly insolvent.

Two grounds for a reversal are urged by the appellants, namely:

1. That Carter having taken the assignment of the judgment against the executors before they reduced Thomas' note to judgment, he holds the judgment freed from the claim of the executors against Thomas.

2. That owing to a want of mutuality the judgments were not subject to be set off one against the other.

There is nothing in the first point. Carter was a purchaser with notice of the equities of the executors, and for that reason alone would stand in no better attitude than his assignor.

On the ground of a want of mutuality, it is objected that as one note was payable by the decedent, and the other to his executors as such, there was such an absence of mutuality that in a suit upon one of the notes the other could not be pleaded as a set-off.

Grant this and it does not follow that, when both debts have been reduced to judgment, the executors being judgment creditors in the one case and defendants in the other, each in the representative capacity, a want of mutuality still exists. On the contrary the judgments are mutual in their character. In *Waterman on Set-Off*, section 344, it is said: "Demands which in their nature can not be made the subject of set-off—such as demands arising upon personal torts—as soon as they are put into judgment, are placed upon the same legal footing as all other judgments, irrespective of the nature of the action in which they were recovered; or, in other words, all the peculiar features which may have characterized a claim, whether

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privilege or disability, are at once lost sight of and merged when judgment is perfected on it, and the demand takes rank equally among all other judgments."

But it is insisted that there can be no set-off of judgments in any case where representatives of a decedent are plaintiffs in one and defendants in the other judgment, and we are referred as authority for this proposition to *Dayhuff v. Dayhuff's Adm'r*, 27 Ind. 158; *Harte v. Houchin*, 50 Ind. 327; *Welborn v. Coon*, 57 Ind. 270; and *Convery v. Langdon*, 66 Ind. 311.

The above were cases in which administrators were plaintiffs and the mutual debts had not existed at the death of the decedent. It was held, therefore, that claims that were not mutual could not be set off in such actions. There are obvious reasons for this rule. To allow a set-off to a debtor of an indebtedness that did not exist at the time of the death of the decedent, or to permit a liability incurred by the personal representative to be pleaded as a set-off to a debt due the decedent in his lifetime, would, in the language of the court in *Granger's Adm'r v. Granger*, 6 Ohio, 35, cited approvingly in *Convery v. Langdon*, "change the course of distribution of intestate estates."

The law provides how debts of solvent estates shall be paid, and provides for the distribution of the assets of insolvent estates, so a creditor of an estate is under no necessity of seeking a set-off. The theory of the appellants is that an executor has no remedy against an insolvent debtor of the estate who is also a creditor, but must pay the debt against the estate to the insolvent debtor or his assignee, while the latter is protected by the convenient fiction of a want of mutuality from having the judgments set off against each other.

But this doctrine of mutuality is not permitted to work injustice. Thus, in *Brewer v. Norcross*, 17 N. J. Eq. 219, it is said: "Wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off will be allowed, though the debts are not mutual. * * In cases of insolvency, or of joint credit given on account of individual indebtedness,

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or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious and the set-off will be allowed." The chancellor cites, in support of the text: *Vulliamy v. Noble*, 3 Meriv. 593; *Dale v. Cooke*, 4 Johns. Ch. 11; *Blake v. Langdon*, 19 Vt. 485; 2 Story Eq. Juris., sec. 1437; *Receivers v. Paterson Gas Light Co.*, 3 Zab. 283.

This court announced the same doctrine in *Keightley v. Walls*, 27 Ind. 384. See also *Lindsay v. Jackson*, 2 Paige, 581.

The record in the case at bar shows that Thomas was insolvent before and at the time when the motion to offset the two judgments was filed, and the equity jurisdiction of the court to grant the relief asked was clear.

There is no error in the record and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the costs of the appellants.

No. 7554.

EIGENMAN v. THE ROCKPORT BUILDING AND LOAN ASSOCIATION.

PLEADING.—Amendment.—A pleading may be amended by filing an amendment thereto, without re-writing the whole pleading; and in such case the original pleading and the amendment will constitute the amended pleading.

SUPREME COURT.—Demurrer.—A demurrer to a complaint, treated in the court below, without objection, as in a cause, though not entitled as of any cause or court, will be so regarded by the Supreme Court.

BILL OF EXCEPTIONS.—Evidence.—A bill of exceptions, which declares that it contains all the evidence, but does not contain written evidence which it shows was admitted, is not sufficient to present any question to the Supreme Court as to the sufficiency of the evidence.

BUILDING ASSOCIATION.—Mortgage.—Pleading.—Evidence.—Witness.—Cross-Examination.—A complaint alleged an agreement by the defendant, in

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consideration of the assignment to him by the plaintiff of a certain mortgage, that he would pay to the plaintiff certain sums of money, and the further sum of \$10 on Friday of each week, as dues on the principal of said mortgage, and \$20 on the first Friday of each month as interest on said mortgage, in accordance with sections 3, 4 and 7 of the constitution and by-laws of the plaintiff (a building and loan association), until all the shares of stock should be paid and the plaintiff dissolved; and further, that he would pay the plaintiff all further sums or dues which might be assessed by its board of directors against him; that the sum of \$200 was legally assessed, and that the mortgage was duly assigned, and that the shares were not fully redeemed. There was a proper breach assigned, and bill of particulars.

Held, that the complaint was good on demurrer.

Held, also, that the constitution and by-laws of the plaintiff, also an order of its board of directors authorizing the assignment of the mortgage by its president and secretary, were admissible in evidence.

Held, also, that a witness, the secretary of the plaintiff, might state the amount due from the defendant without accompanying the statement with the data from which it was made and a statement of the plaintiff's assets and liabilities; and if the defendant desired the data, or the sources of knowledge of the witness, he could obtain them on cross-examination.

From the Spencer Circuit Court.

D. T. Laird and C. A. DeBruler, for appellant.

C. L. Wedding, for appellee.

MORRIS, C.—This suit is brought by the appellee upon a contract made by it with the appellant. It is alleged, in the original complaint, that on the 29th day of December, 1876, the appellee was the owner of two mortgages executed to it by Lewis Gunsler, one of its members, on certain real estate; that the appellant held a junior mortgage on the same land; that he purchased of the appellee its mortgages and agreed to pay therefor in advance, all dues on principal, interest and fines that might become due and owing on said mortgages by Gunsler, up to July 12th, 1877, and also to pay the plaintiff below, after July 12th, 1877, the further sum of ten dollars on Friday of each week, as dues on the principal of said mortgages, and twenty dollars on the first Friday in each month, as interest on said mortgages, in accordance with sec-

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tions 3, 4 and 7 of article 13 of the constitution and by-laws of the plaintiff, until all the outstanding shares of stock owed by the plaintiff should be paid, and the plaintiff dissolved; and further, that the appellant would pay the plaintiff all further sums or dues which might arise or be assessed by its board of directors against him. It is averred that \$200 were legally assessed by the plaintiff against the appellant, which remains due and unpaid. It is averred that said mortgages were duly assigned to the appellant, who has failed and refused to pay said sums of ten dollars due on Friday of each week, and said sum of twenty dollars, due on the first Friday of each month, in accordance with the constitution and by-laws of the plaintiff, though often requested so to do. It is also averred that there was chargeable to said mortgages assigned to the appellant, after July 12th, 1877,—the sum not stated; that the outstanding shares owed by the appellee are not fully redeemed in accordance with its constitution and by-laws; that there is due the plaintiff on said agreement \$186.00. A bill of particulars is filed, showing the items of indebtedness claimed; also copies of said mortgages and assignments were filed with the complaint.

The appellant demurred to the complaint on the ground that it did not contain a cause of action. The demurrer was sustained. The record then proceeds as follows:

“And now comes the plaintiff and files his amended complaint, which said amendment is in these words and figures: ‘Said defendant also at the same time expressly agreed that if said plaintiff would assign his [its] said mortgages he would pay said plaintiff all and any further dues which might arise or be assessed by the plaintiff’s board of directors, as aforesaid, against him. And the plaintiff avers that there is due and was legally assessed against said defendant, the sum of two hundred dollars, which remains unpaid.’ And also the defendant files his answer.”

The appellant filed an answer to the amended complaint in seven paragraphs. Afterward, upon leave of the court, the

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appellant withdrew his answer and filed his demurrer to the amended complaint, which is set out in the record thus:

“ Which said demurrer is in words and figures as follows :

“ ‘ The defendant demurs to the plaintiff’s complaint herein, and for ground of demurrer says, that said complaint does not state facts sufficient to constitute a cause of action against him. ‘ DeBruler & Hatfield and D. Laird, for defendant. ’ ”

The court overruled this demurrer, and the appellant excepted.* He then refiled his answer. No reply seems to have been filed to the answer. The cause was submitted to a jury ; verdict for the appellee. The appellant filed a motion for a new trial, which was overruled, and he excepted. He also filed a bill of exceptions purporting to contain all the evidence given in the cause.

The errors assigned are numerous. The first is, that the court erred in overruling the demurrer to the complaint. The last, which includes all the others, is, that the court erred in overruling the appellant’s motion for a new trial.

The appellee asks us to dismiss the appeal because of the incompleteness of, and defects in, the record. He insists that the amended complaint is not in the record, and that the bill of exceptions does not contain all the evidence given in the cause, and is not, for that reason, any part of the transcript.

The amendment seems to have been made by writing it on a separate paper. The record shows that this paper was filed as an amendment to the complaint. This, we think, may be done, and then the two papers—the original complaint and the amendment—will constitute the amended complaint. Where the whole structure of the complaint is changed, it is generally re-written, but where the amendment, as in this case, consists of an additional averment merely, we can see no reason for re-writing the whole complaint. The original complaint and the amendment being in the record, they should be treated as the amended complaint.

The bill of exceptions shows that an entry contained in a book, kept by the secretary of the appellee, was read in evi-

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dence, but it does not contain the entry, nor refer to it, except in the following words, part of the testimony of a witness on behalf of the appellee :

"The book I have here contains the amounts due and paid by all shareholders, computed according to the terms of the mortgage. It includes the Gunsler loan. I kept the book, as secretary." The plaintiff offered the book, so far as it related to Gunsler's computation, in evidence, and the defendant objected because the defendant was not a member of, nor bound by, the entry, which the court overruled, and the entry was read. "One of the books of the association, in which it is his duty, at each meeting, to give every person that pays any thing, credit for it opposite his name. If they do not pay, the blank spaces denote that the sums charged against each person by the constitution and by-laws and the terms of their contract, are against them and unpaid, as here shown in this book."

It is very clear that the bill of exceptions does not contain the entry thus read to the jury, nor all the evidence given in the cause, notwithstanding the formal statement at the conclusion that it does. For this reason, as held in the case of *Sidener v. Davis*, 69 Ind. 336, it can not be regarded as a part of the record. There is no place in the bill of exceptions designating where the entry should be copied into it, nor is the entry copied into it at all. In the case referred to, Judge BIDDLE says :

"We find copied in the transcript what purports to be a bill of exceptions, covering many pages, in which various notes, receipts, contracts, bills of lading, letters, and depositions are mentioned but not copied therein. After the formal closing of the bill and the signature of the judge, these papers so mentioned are copied below in the transcript by the clerk, but have received no sanction by the signature of the judge. It is plain, therefore, that, although the bill of exceptions above the judge's signature states that it contains all the evidence given in the case, yet the unfilled blanks show that it does not."

The bill of exceptions not containing all the evidence given

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in the case, no question as to the sufficiency of the evidence is presented for decision here.

Upon the trial, the appellee offered in evidence its constitution and by-laws; also, an order of its board of directors authorizing its president and secretary to assign the Gunsler mortgages to the appellant, upon his payment of the amount due and to become due thereon up to the 12th day of July, 1877, and upon his giving bond to pay such further dues, fines and interest as should become due on said mortgages according to the constitution and by-laws, after the 12th day of July, 1877. To the introduction of this evidence the appellant objected. The objection was overruled and the evidence admitted. We think there was no error in permitting the constitution and by-laws of the appellee to be read in evidence. The dues and fines and the amount of interest to be paid by members upon loans were fixed by the constitution and by-laws; and the order put in evidence was the authority by which, upon the condition named in it, its officers transferred the mortgages to the appellant. The validity of this order did not depend upon the presence of the appellant at the time of its adoption, nor upon his knowledge of its terms. There was no error in its admission as evidence.

The bill of exceptions states that the appellee "offered to prove by Charles Hicks, as secretary of said association, that there is due from the defendant," the appellant, "and was due on the 12th day of September, 1877, the sum of \$186, as stated in plaintiff's bill of particulars. To the permitting of said evidence to be given to the jury, the defendant objected, because said statement of the amount of said indebtedness was not accompanied by him as such secretary with the data from which it was made and a statement of the assets and liabilities of said association at that time, showing the deficiency due from the defendant on the Gunsler mortgages." This objection was overruled, and the witness was permitted to make the statement. We think there was no error in this. If the witness knew the amount of the appellant's indebtedness

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to the appellee, it was competent for him to state it. If the appellant desired the witness to give the data upon which his statement rested, or the sources of his knowledge, he could have obtained either or both by a proper cross-examination of the witness. There was no error in admitting this evidence over the objection made to its admission.

The remaining question is as to the ruling of the court upon the demurrer.

The demurrer does not contain the names of the parties nor of the court. But it states in proper form the ground of demurrer; it was filed in the cause and acted upon as valid. We think it should be so treated by this court.

The contract declared on was one which the parties were competent to make. The appellee had a right to determine how much it would take for the Gunsler mortgages, and it was the business of the appellant to determine how much he would give for them. Having done this, the law will enforce the contract as made. The complaint alleges that the appellant paid the appellee for the mortgages, the dues thereon up to July 12th, 1877, and agreed to pay after July 12th, 1877, the further sums of \$10 on Friday of each week, and \$20 on the first Friday in each month, and such further sums as might be legally assessed by the appellee's board of directors against him on account of the mortgages. Looking at the transaction, the purpose for which the mortgages were taken by the appellee and the relation of Gunsler to it, we think the appellee would not have been disposed to transfer the mortgages, which secured all dues, fines and assessments which it might legally make on Gunsler's stock, or for which he might become liable on account thereof, as well after as before the 12th of July, 1877, so as to diminish the security. It would require Eigenman to stand as surety instead of the mortgages. And this would be just and fair, and what he, by the contract, as set out in the complaint, agreed to do. The receipt of these dues, fines and assessments by the appellee from the appellant as the assignee of the mortgages, and under

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the contract, would operate as an equitable assignment of such dues, fines and assessments to the appellant. Equity would keep them alive for his benefit, and the mortgage, having been given to secure their payment, would still stand as such security for their payment in the hands of the appellant, who could foreclose the mortgages for their payment. *Howe v. Woodruff*, 12 Ind. 214.

It is insisted by the appellant that the appellee ceased to exist on the 12th day of July, 1877, and that this is apparent upon the face of the complaint. By the 6th section of "An act establishing provisions respecting corporations," 1 R. S. 1876, p. 370, which is applicable to the appellee, it continued to exist after the 12th day of July, 1877, for the purpose of settling and winding up its business. It is averred in the complaint that the appellee owed on several shares of stock at and after the 12th day of July, 1877, and that they were outstanding and had not been fully paid at the commencement of this suit; that it was by the collection of dues, fines and assessments alone, that these outstanding and unredeemed shares could be paid and liquidated. The complaint shows, therefore, that the appellee has not ceased to exist.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be in all things affirmed, at the costs of the appellant.

No. 8770.

HILL, ADM'R, v. MINOR ET AL.

MORTGAGE.—*Foreclosure.—Instalment Notes.—Assumption of Indebtedness.*—A mortgage which secures several notes maturing at different times, and which has been foreclosed as to the last note falling due, may again be foreclosed for the remaining notes as against a person who has purchased

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the equity of redemption after the foreclosure, with full knowledge that the prior notes were unpaid, and who assumed to pay them as a part of the purchase-money.

SAME.—Estoppel.—Merger.—Such person is equitably estopped to insist that the mortgage is merged in the foreclosure proceedings.

From the Elkhart Circuit Court.

A. Anderson, H. D. Wilson and W. J. Davis, for appellant.
J. D. Osborn; E. G. Herr and J. A. S. Mitchell, for appellees.

BEST, C.—On the 6th day of April, 1863, John Lacount executed to Philip M. Henkle a mortgage upon certain real estate, to secure three promissory notes given for the purchase-money, maturing one, two and three years from date respectively, with interest, and without relief from valuation laws, the first and second for \$200 each, and the third for \$130. The notes and mortgage were transferred by delivery to the appellant's intestate, and the land was conveyed, by *mesne* conveyances, to Joseph Miltenberger, who conveyed it to Norton J. Minor, one of the appellees, and whose deed contained the following stipulation: "This conveyance made subject to a certain mortgage executed by John Lacount to Philip M. Henkle, of Goshen, Indiana, which said mortgage is dated April 6th, 1863, and duly recorded in the recorder's office of said county, in Record 6, at page 288, of the mortgage records of said county, which said mortgage said Norton J. Minor hereby assumes and agrees to pay."

On the 7th day of September, 1874, this suit was brought to foreclose the mortgage as to the first and second notes, and to obtain a personal judgment against Lacount, as maker of the notes, and against Minor upon his assumption to pay them. Minor answered that after the maturity of the third note, and before his purchase, the appellant's intestate foreclosed the mortgage as to the third note, purchased the property at the foreclosure sale, and during the year for redemption he, Minor, purchased the property of Miltenberger, paid the purchase-money, except the amount of the foreclosure judgment, as—

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sumed to pay the mortgage without any notice that the first and second notes remained unpaid, and afterward fully paid the judgment by the redemption of the property.

This answer was held good by this court. *Minor v. Hill*, 58 Ind. 176. Afterward, issues were properly formed, the cause submitted to the court, and, at the request of the parties, the court found the facts specially, stated its conclusions of law thereon, to which appellant excepted, and rendered final judgment for the appellees.

The appellant appeals and insists that the court erred in its conclusions of law.

The facts found are these: "The defendant Lacount, on the 6th day of April, 1863, executed to the defendant Henkle the mortgage and notes, copies of which are filed with the complaint, and also a third note referred to in the complaint and secured by said mortgage, said notes being given for a part of the purchase-money of the real estate described in said mortgage. On the 12th day of April, 1863, said Henkle assigned said notes and mortgage to Henry B. Hill, plaintiff's intestate, as is averred in the complaint, said mortgage having been duly recorded, April 6th, 1863. Said Henkle never had any personal right, title or interest in or to said notes and mortgage, but held them for the use of said Henry B. Hill, the beneficial and real owner thereof, and in manner following, to wit: Said Hill had been and was the owner of said real estate, and said Henkle was his agent for the sale thereof, and said Lacount, negotiating for the purchase thereof, refused to accept a deed directly from said Hill, but insisted that Henkle should be his grantor, and accordingly Hill conveyed to Henkle, and Henkle conveyed to Lacount, who gave to Henkle said notes and mortgage, and Henkle assigned the same to Hill, never having had any interest therein other than as shown by the facts stated. Henkle was the agent of Hill for the sale of several other tracts of land, and for the collection of notes and mortgages given therefor, and continued such agent for some years, to wit, at least until 1866. When the

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agency terminated is not shown. On the 21st day of July, 1863, said Lacount, by deed, conveyed said real estate, subject to said mortgage, to George P. Morse, who, on March 12th, 1866, conveyed the same by deed to Orsenus D. Minor (the father of the defendant Norton J. Minor), said conveyance, by the terms of said deed, being subject to said mortgage, which said Minor assumes and agreed to pay. On September 29th, 1866, said O. D. Minor conveyed said land to Joseph Miltenberger by deed, by the terms of which the conveyance was subject to said mortgage, which said Miltenberger assumed and agreed to pay, and said Miltenberger, on October 28th, 1873, conveyed said land to the defendant Norton J. Minor by deed, a copy of which is filed with the complaint. Said conveyances were all made by warranty deeds, which were duly recorded, except the deed from O. D. Minor to Miltenberger, which was recorded October 21st, 1868. The notes sued on were due at commencement of this suit, and were then, and remain yet, unpaid, amounting, principal and interest to this date, to the sum of \$753, which, if anything, plaintiff is entitled to recover. On the 28th day of August, 1873, said Henry B. Hill, by his attorney, William C. Wilson, commenced an action in the Elkhart Circuit Court against the defendants Lacount and Henkle and said Joseph Miltenberger, upon the third and last note described in said mortgage, and for the foreclosure of said mortgage, and on September 6th, 1873, duly obtained judgment thereon for \$211.73, and a decree for the foreclosure of said mortgage, and an order for the sale of said land to satisfy said judgment and decree. And afterward, to wit, November 1st, 1873, by virtue of said order of sale duly issued, said land was duly sold by the sheriff to the plaintiff Henry B. Hill for the amount of said decree and costs, from which sale, within one year thereafter, the defendant Minor made redemption by paying the proper sum to the clerk of the county for that purpose, and which redemption money was received by said Hill. The defendant Minor, at and before the date of the deed from Miltenberger to him,

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had notice that the two notes now in suit had not been paid, and also knew that they were not included in said decree of foreclosure, but supposed said notes had been lost. At the time of the drawing and executing of said deed by Miltenberger to defendant Minor, Minor requested that the assumption of the mortgage and debt be left out of the deed, as he expected to pay the judgment on the one note anyhow. Miltenberger refused to execute a deed unless it would include the whole of the mortgage, and thereupon the deed was drawn and executed as set out in the complaint, upon the consideration of \$1,100 (as named in the deed), which was paid in personal property in part, and the remainder in the assumption of said mortgage, as in the terms of said deed expressed. Said personalty was worth about \$700, but what estimate, if any particular estimate, was placed upon it by the parties, is not shown. When said action of foreclosure was begun, and until after decree and sale thereon of said land, the notes now in suit were in possession of said Henkle, but his possession was unknown to, or had been forgotten by, him and said Hill. It is uncertain on the testimony, whether said Henkle had ever surrendered actual possession of said notes to said Hill before 1874, but the stronger probability seems to be, and the court accordingly finds, that within a few days after their date said Henkle did send said notes and mortgage by mail to said Hill, and within two years said Hill returned said two notes (now in suit) to said Henkle for collection, and about that time the title to the land having been brought into litigation, no further steps were taken to enforce collection until 1872, when said Hill sent the third note and mortgage to his attorney Wilson, and the same was foreclosed, as already found and stated, it having in the mean time been forgotten or overlooked that said two notes were in possession of said Henkle. In 1874, said Henkle having been requested by the attorney of Hill to do so, made search for said notes, and found the same and delivered them to plaintiff's attorney, and thereupon this action was commenced. Said Henry B. Hill, after commencing this

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suit, died. The present plaintiff is his duly appointed administrator. The defendant Lacount gave no consent to entering of said decree of foreclosure upon said note alone, and without including said notes now in suit, unless such consent must be inferred from the record of said foreclosure suit. Said Lacount did not appear to said suit, but the judgment and decree therein had against him were taken upon default."

When this case was here before the question presented for decision was thus stated: "Can the holder of a mortgage on real estate, and three notes secured thereby, payable at different times, after having foreclosed the mortgage for the note last due, again foreclose it for the two notes first due, as against the purchaser of the equity of redemption, who purchased after the first foreclosure, subject to the mortgage, and paid the purchase-money except the amount due on the mortgage, which he assumed to pay as part of the purchase-money, he having no notice at the time of his purchase that the two notes first due had not been paid?"

This question was decided in the negative. The court, after declining to decide whether or not the holder of several notes, payable at different times and secured by the same mortgage, after all have matured, can have separate actions to foreclose the mortgage upon each note, said: "In this case, when Minor bought the equity of redemption and stipulated to pay the mortgage, judgment of foreclosure had been entered upon the last note, and he had no notice that the prior notes had not been paid, and it seems clear to us that he had a right, as against the plaintiff's intestate, to presume, from the fact that the foreclosure was entered upon the last note only, that the prior ones had been paid. As against him, under these circumstances, it would be inequitable to allow another foreclosure."

This conclusion was based upon the alleged fact, that he, Minor, had no notice, at the time of his purchase, that the two notes first maturing had not been paid; and as the facts found not only show that he did have notice that they were unpaid,

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but that he especially stipulated to pay them, it would be inequitable, we think, not to allow a foreclosure against him. At the time of his purchase the mortgage had been foreclosed as to the third note, and, if it be conceded that such foreclosure merged the mortgage in the judgment, it did not satisfy the debt for which the mortgage was executed, nor did it exonerate the maker of the notes, nor any vendee of the property who had assumed their payment, from a personal liability to pay them.

The assumption of the mortgage debt by Minor rendered him personally liable to pay it. *McDill v. Gunn*, 43 Ind. 315; *Josselyn v. Edwards*, 57 Ind. 212; *Bentley v. Vanderheyden*, 35 N. Y. 677.

Miltenberger had assumed to pay the mortgage debt, but, as between him and Minor, it was the duty of the latter to pay it. After Minor's purchase, his relation to Miltenberger was that of principal, and, had the latter paid the debt, he would have been subrogated to all the rights of the holder of the mortgage. *Josselyn v. Edwards*, 57 Ind. 212; *Figart v. Halderman*, 75 Ind. 564.

Miltenberger, in selling the land, recognized his legal and moral obligation to pay the mortgage debt, notwithstanding the foreclosure, and both he and Minor treated the mortgage as a valid and subsisting security for its payment. Under these circumstances, we think that, if Miltenberger should be compelled to pay the debt, a court of equity would not hesitate to allow him to foreclose the mortgage against Minor. Miltenberger could waive such defence as grew out of the merger of the mortgage, and, as it was his duty to pay the debt, it was to his interest to treat the mortgage as a subsisting lien upon the property. This he might do by requiring an obligation from his vendee to assume its payment. In this case, this is what was done. Miltenberger would not sell unless Minor would agree to pay the *whole* debt. This he agreed to do, and upon this consideration the land was conveyed to him. The means were placed in his hands with which to pay the debt, and a

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court of equity will not allow him to avoid the payment of the debt by urging a defence that, as between him and Mittenberger, was purely personal to the latter. Under such circumstances, a court of equity will treat the mortgage as they treated it, as a valid and subsisting lien upon the land; one that may be enforced by an ordinary foreclosure proceeding.

When this case was here before, it was said that Minor's stipulation to pay the mortgage could not operate in favor of the appellant beyond the amount for which the mortgage was foreclosed, because Minor had no notice that the residue of the mortgage debt was unpaid. In connection with the facts averred, the stipulation was properly construed; but in view of the fact that he did know that the debt was unpaid, and that he expressly agreed to pay the whole of it, the stipulation can not be thus limited. It must be deemed to be what it purports to be, an undertaking to pay the whole debt. This is what was intended and what is clearly expressed by the stipulation in the deed. In view of these facts, we think Minor is equitably estopped to say that the mortgage is not valid and binding upon him. It has been decided several times by this court that a purchaser who buys real estate subject to a mortgage which he assumes to pay can not set up the defence of usury. *Stein v. Indianapolis, etc., Association*, 18 Ind. 237; *Butler v. Myer*, 17 Ind. 77.

It has also been decided that such purchaser can not set up the defence of want or failure of consideration as between the mortgagee and mortgagor. *Price v. Pollock*, 47 Ind. 362.

In *Freeman v. Auld*, 44 N. Y. 50, the court, by GRAY, C., in passing upon a similar question, said: "The purchaser, taking title subject to it (the mortgage), is estopped from questioning its validity, and must pay it if he has agreed to; and if not, he must allow the lands conveyed subject to it, to be applied to its payment." HUNT, C., said: "The premises were purchased by the defendant, and conveyed to him 'subject, nevertheless, to certain mortgages now a lien on said premises.' * * In receiving his conveyance upon these

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terms, the defendant admitted and agreed, that this \$4,000 mortgage was a lien upon the premises. He can not now deny it. If the conveyance had contained the further words, 'which the said grantee hereby assumes and promises to pay,' a personal liability would also have existed, by which he could have been compelled actually to pay the mortgage, although the deed was not signed by him."

So also is Minor estopped to deny the validity of this mortgage.

Lacount does not oppose the foreclosure, but insists, as between him and Minor, the latter is the principal debtor, and that execution over should be first issued against him.

For these reasons we think the judgment should be reversed, and the cause remanded, with instructions to render a judgment of foreclosure against Minor and Lacount for the amount found due, with interest till the rendition of the judgment, and a personal judgment over, execution to issue first against Minor.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things, reversed, at the appellees' costs, with instructions to render judgment as above ordered.

No. 8410.

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SHERIFF'S SALE.—Deed.—Misdescription.—Color of Title.—Subrogation.—Conveyance.—Where land sold at sheriff's sale, upon execution, is misdescribed in the levy, return and notice, or, on foreclosure of a mortgage, where the decree is void for want of notice, and the land is misdescribed in the decree and sheriff's deed, the purchaser receiving a sheriff's deed nevertheless takes color of title, which he can convey, and the right of subrogation to the rights of the judgment or mortgage creditors passes to his grantees.

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ASSIGNMENT OF ERROR.—*Supreme Court.—Practice.*—That the court erred in rendering the judgment set out in the record, as an assignment of error, is too vague to raise any question in the Supreme Court.

From the Montgomery Circuit Court.

E. C. Snyder, G. D. Hurley and B. Crane, for appellant.

G. W. Paul, for appellees.

BICKNELL, C. C.—This was a suit by the appellees against the appellant and others, to quiet title to land and to procure a subrogation of the appellees to the rights of a prior mortgagee of the land, as against the appellant, who was the son and only heir of the mortgagor.

John Ray owned and occupied land in Montgomery county, Indiana; he went to Illinois in 1868, and has never been heard of since; his wife obtained a divorce and married again. The appellant, his son and heir, is now nearly of age, and claims the land, and threatens to sue for it. John Ray had mortgaged the land to secure two notes given by him for the purchase-money; these notes and the mortgage had been assigned to Levi Curtis.

About the time Ray went away, his creditors, Stephen Jones and fourteen others, commenced separate proceedings against him by attachment, and they all obtained judgments. The attachment proceedings were invalid, but the judgments were good, because the summons was personally served, in each case, by copy left at Ray's last usual place of residence. Upon the judgments executions were issued, and Stephen Jones bought the land at the execution sale, and the money he paid was distributed among the execution creditors *pro rata*. In these proceedings the land was misdescribed in the levy, the return and the advertisement, but the intention was to sell and to buy Ray's land.

In such a case, a purchaser who gets a deed from the sheriff has color of title, whether the sheriff had authority to sell or not, and the rights of the purchaser pass to his assigns. 2 R. S. 1876, p. 257, section 621. And whenever land so sold

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is recovered by any person originally liable, or in whose hands the land would be liable for the debt, the plaintiff shall not be entitled to the possession of the land until he has refunded the purchase-money with interest. 2 R. S. 1876, p. 257, section 625; and see *Walton v. Cox*, 67 Ind. 164.

Curtis, the holder of the notes and mortgage, was the father of John Ray's wife, but he made no objection to the attachment proceedings; his mortgage, although recorded, was defectively acknowledged, and, probably, was supposed to have lost its priority, but it was a valid mortgage, and by virtue thereof Curtis redeemed the land from Jones, and paid him \$1,608 redemption money. He then foreclosed his mortgage and in the same suit obtained a decree for the sale of the land to satisfy the mortgage and to repay him the redemption money. This foreclosure suit was commenced by publication, and the notice by publication was void for want of a sufficient affidavit, and the land was misdescribed in the decree. The mortgage, however was a part of the complaint, so that the entire record contained a good description. See *Burton v. Ferguson*, 69 Ind. 486. The court, however, had no jurisdiction over the person of John Ray, and the foreclosure decree was therefore void, and the sheriff's sale was void, but that sale occurred on the 21st day of August, 1869, and no suit has been brought to recover the land. 2 R. S. 1876, p. 123, section 211, clause 3; *Brown v. Maher*, 68 Ind. 14. And undoubtedly, as we have already seen, the purchaser at such a void sale would have color of title, and all his rights would pass to his assignee.

At the foreclosure sale, Stephen Jones became the purchaser, for \$4,155.73, which paid Curtis his mortgage money and also his redemption money, and the sheriff made Jones a deed dated August 21st, 1870, containing the same misdescription as the decree. In January, 1872, Jones, being in possession of the land, conveyed the same by warranty deed to James M. Plunkett and John W. Plunkett, by the same misdescription, and put them in possession. The Plunketts and their wives, in February, 1875, conveyed the lands by the same misde-

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scription to Stephen Jones, who was to hold thirteen and three-fourths acres of it, south of the State road, until John W. Plunkett should pay him for it, and was to convey the remaining 130 acres, north of said road, to Stow S. Detchon, who had bought it from the Plunketts. Jones did convey to Detchon said 130 acres, in April, 1875, and Detchon took possession and has made permanent improvements of the value of \$3,000. John W. Plunkett paid Jones in full for the thirteen and three-fourths acres south of the State road, and has made permanent improvements thereon of the value of \$2,000, and the Plunketts and Jones have had possession since August 21st, 1869. The complaint of the appellees stated the foregoing facts. It was in two paragraphs, differing only in this, substantially, to wit, that the first paragraph prayed that the appellees' title might be quieted, or that the mortgage might be foreclosed, etc., while the second admitted that Curtis's foreclosure proceedings did not pass the title, and prayed that the appellees might be subrogated to the rights of Curtis, and that the land might be sold to pay them the mortgage debt and the redemption money.

There was no demurrer to the complaint, but the first two errors assigned by the appellant question the sufficiency of each of the said paragraphs—as both paragraphs pray for subrogation. If they are good for that relief, the prayer for quieting the title is not material. In *Muir v. Berkshire*, 52 Ind. 149, BIDDLE, C. J., giving the opinion of the court, says, after stating the general rules upon subrogation: "But while this is the rule generally, we think that a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, should be subrogated to the rights of the creditor." And again: "Although the deed of Holman did not convey a good title to James Muir, yet it conveyed all the interest Holman had in the land at the time; and that interest was the right to foreclose the mortgage against it and have the mortgage debt paid out of the proceeds. We think, therefore, that the deed operated as an equitable assignment of the

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mortgage." See also *Robinson v. Ryan*, 25 N. Y. 320; *Brobst v. Brock*, 10 Wal. 519; *Jackson v. Bowen*, 7 Cowen, 13; *Josselyn v. Edwards*, 57 Ind. 212; *Hoffman v. Risk*, 58 Ind. 113. Under the authority of these cases each paragraph of the complaint is sufficient.

The appellant, by his guardian *ad litem*, answered in four paragraphs:

1st. In denial.

2d. That he is the only son and heir of John Ray, who left his home in 1868, and has been absent, unheard-of, ever since, and that appellant is the owner of the land in controversy.

3d. As to the first paragraph of the complaint, this defence contains the same allegations as the second defence, with the further averments that appellant owns said land subject to said mortgage; that the appellees and their grantor, Stephen Jones, have had possession since 1869; that since that time the rents and profits of the 13 $\frac{1}{2}$ acre tract have been worth \$250 a year, and of the 130 acre tract \$500 a year, and that \$1,500 worth of timber has been taken from said land by the appellees and said Jones, and that said land has been injured "by protracted and exhaustive cultivation \$2,000;" and he prays that these matters may be taken into account, and that he may have a year's time to pay any balance which may be decreed against him, and that on payment of such balance he may have a writ of possession for the land, and all proper relief.

4th. As to the second paragraph of the complaint, this defence contains all the allegations of the third defence, except that instead of averring that Emerson Ray owns the land, "subject to said mortgage," it avers that he owns it "subject to certain liens."

The appellees replied in denial of each of the special defences.

The appellant filed a fifth paragraph of answer to the entire complaint, which fifth paragraph contains all the averments of the second paragraph of answer, and that Curtis was the owner of the notes and mortgage, and as such had pos-

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session of the land until Jones took it, and that Jones, when he took it, was equitable owner of said notes and mortgage, and held possession as such until the appellants and James M. Plunkett took the land, and that the appellees hold the land as equitable owners of said notes and mortgage, and that such possession has been and is a possession of mortgagees only, without any other claim or right; that when Curtis took possession there was due upon said notes and mortgage \$1,763.80, and that said notes bore interest at 6 per cent.; that the rents and profits of said land, during the entire possession aforesaid, were worth \$6,000; that the appellee Detchon committed waste by removing from said land a dwelling-house worth \$500, and that all of said parties, when they took possession as aforesaid, had notice of the defect in their title; that the permanent improvements of the appellees were not made in the belief that they owned the land, and were not judicious or proper improvements. Wherefore the appellant asks for an accounting, and that said rents and profits may be applied in payment of the mortgage debt, and that appellant may have judgment for the balance, and for all waste, and for possession and all proper relief.

The appellees moved to strike out parts of said fifth paragraph of answer, and said motion was overruled by the court, to which ruling the appellees excepted. The appellees then filed a reply in denial of said fifth paragraph. The issues thus joined were submitted to the court for trial, and the court found for the appellees, substantially in accordance with the prayer of the complaint, that the appellees should be credited with \$10,094.48, and charged with \$4,802.50, leaving a balance in their favor of \$5,291.93, which was a lien on the lands in controversy, and that John Ray was dead and Emerson Ray was his only heir. The court rendered judgment upon the finding, for the sale of the lands by the sheriff to pay first the costs of this suit, and then the appellees, and that the surplus should be paid to Emerson Ray, the appellant.

The appellant moved for a new trial; the court overruled

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MORTGAGE.—*Foreclosure.*—*Real Estate.*—*Complaint.*—*Claim of Interest.*—In a complaint to foreclose a mortgage on real estate, an averment that a defendant has, or claims to have, some interest in the mortgaged premises, is sufficient on demurrer without specifying the interest he has or claims.

SAME.—*Vendor and Purchaser.*—*Answer.*—*Reply.*—*Prior Mortgage.*—*Bankruptcy.*—Where the answers to such complaint, among other things, aver that the owner of the land conveyed it to the defendant by warranty deed, and put him in possession thereof, and, becoming bankrupt, the land was sold to pay a prior mortgage and conveyed to one who conveyed it to his grantor, who thereupon executed to plaintiff the mortgage in suit; that his grantor and the plaintiff conspired to defraud him of his title; that the purchase was made in trust for his grantor and the title enured to the benefit of the defendant; that, in an action of ejectment between his grantor and himself, the defendant prevailed; that, in an action against his grantor to quiet his title, the defendant also had judgment,—a reply that the defendant was a party to the decree of foreclosure under which the land was sold to plaintiff, proved his claim in bankruptcy by his oath that he had been dispossessed of the land described in the mortgage, and upon its allowance received his dividend, is good on demurrer.

SAME.—In such case the title so acquired by the grantor does not enure to the benefit of his grantee.

SAME.—*Possession.*—The possession of the judgment defendant after sheriff's sale is not adverse to the purchaser.

SAME.—*Parties.*—A mortgagee, who was not a party to actions of ejectment and to quiet title between persons claiming the mortgaged premises, is not bound by the decrees.

SAME.—*Evidence.*—In such case, in his foreclosure proceedings, transcripts of the decrees are not admissible in evidence.

EVIDENCE.—*Bankruptcy.*—*Record of District Court of United States.*—A transcript of a record of a bankruptcy proceeding in the District Court of the United States for the district of Indiana, is admissible in evidence in a court of this State, under section 283, 2 R. S. 1876, p. 150, when proved by the attestation of the keeper of such record and the seal of the court.

From the Marion Circuit Court.

T. B. Adams, L. T. Michener, B. F. Love, W. Morrow and N. Trusler, for appellants.

J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellee.

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FRANKLIN, C.—This is an action commenced by Russell against Joshua Shipp, Jane Shipp and Chandler Bradford.

The action is based upon a note executed by Joshua, and a mortgage executed by Joshua and Jane, to secure the payment of the note. The complaint alleges that Bradford held possession of the mortgaged premises and claimed an interest in the land, making him a co-defendant to answer as to his interest.

The suit was commenced in the Shelby County Circuit Court, and the venue changed to Marion county, where the cause was tried. Shipp and wife appeared and answered, but afterward withdrew their answers and were defaulted. Bradford demurred to the complaint; demurrer overruled and an exception. He then answered in eight paragraphs, to which Russell replied in two paragraphs. Demurrer to second paragraph of reply overruled, and exception reserved. Trial by the court and finding for the plaintiff. Motion for a new trial overruled, and ruling excepted to. Motion in arrest of judgment overruled and exception taken, and judgment rendered for the plaintiff for \$2,553.76, and foreclosure of mortgage.

The defendant Bradford alone appeals to this court from the judgment of foreclosure of the mortgage as to him; and he has filed the following assignment of errors:

- 1st. Overruling demurrer to complaint;
- 2d. Overruling demurrer to second paragraph of reply;
- 3d. Overruling motion for a new trial;
- 4th. Overruling motion in arrest of judgment.

The facts in this case, as we gather them from the record, are as follows:

On the 1st day of May, 1871, said Joshua Shipp and wife executed a mortgage to one Lewis on certain lands in Shelby county, Indiana, including the land in dispute, for \$20,000.

On the 29th day of September, 1871, he conveyed the land in dispute, by warranty deed, to appellant Bradford.

On the 26th of June, 1872, a petition was filed in the United
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States District Court for the State of Indiana against said Shipp to have him declared a bankrupt. He was so declared and adjudged by said court.

On the 30th day of April, 1874, the assignee of said bankrupt filed his petition asking to sell said land free from all mortgages and liens, and the claim and interest of said defendants Bradford and wife, making them defendants thereto.

On the 27th day of August, 1875, the court ordered said land to be sold free from all mortgages and liens, and all claims of any interest or equity of any kind whatever of the defendants Chandler Bradford and Mary Bradford in and to the land in controversy, and that their claims and interest be forever barred and foreclosed.

On the 8th day of October, 1875, said land was so sold by a commissioner appointed by said court, and said appellee Russell became the purchaser for \$2,000. On the 11th day of February, 1876, said sale having been approved and confirmed by said court, said commissioner conveyed all the claim, right, title and interest of Joshua Shipp, Jane Shipp, Chandler Bradford and Mary Bradford in and to said land to said Russell.

On the 8th day of September, 1875, said Joshua Shipp received his final discharge in bankruptcy.

On the 8th day of February, 1876, said Bradford proved in said United States District Court his claim for a breach of the warranty in his said deed; and on the 24th day of November, 1876, received his distributive share thereon of the assets of said bankrupt's estate. On the 21st day of June, 1876, said appellee conveyed the land in controversy to said Joshua Shipp, and took the notes in suit for the purchase-money, dated June 20th, 1876, and the mortgage in suit to secure their payment, dated August 2d, 1876.

On the 19th day of April, 1877, said Bradford brought a suit against said Shipp, in the Shelby County Circuit Court, to quiet his title to said land, which, on the 3d day of December, 1878, was decided by said court in his favor. And on

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the 18th day of July, 1877, said Shipp brought a suit of ejectment in said court against said Bradford, which was also decided in said Bradford's favor. That appellee Russell was not made a party to either of said suits. And on the 6th day of November, 1878, this suit was commenced.

The demurrer to the complaint stated as the only cause, a want of sufficient facts.

The first objection to the complaint, under the assignment of error in overruling the demurrer, is, that the allegation that Bradford then had possession of the said tract of land, and claimed an interest therein, was too general, and did not state what interest Bradford claimed. There was no motion made to make it more specific. If he claimed no interest, he could have filed a disclaimer and gone out of the case. If he claimed an interest, he had a right to set that interest up specifically in an answer, which he did.

Under a demurrer, it is sufficient, in a complaint to foreclose a mortgage, to aver that a defendant has or claims some interest in the mortgaged premises, in order to require him to answer as to that interest. 2 Jones Mortgages, section 1396; *Martin v. Noble*, 29 Ind. 216; *Bowen v. Wood*, 35 Ind. 268; *Bloomer v. Sturges*, 58 N. Y. 168. For the same reasons, we think the second, third and fourth objections to the complaint are not well taken. The last objection is, that although the complaint avers that "copies of each of which said notes and mortgage are filed herewith and made part hereof," but no copies thereof are attached to or filed with the complaint. This omission in the record has since been properly supplied by *certiorari*.

We see no error in overruling the demurrer to the complaint.

The second assignment of errors is upon overruling the demurrer to the second paragraph of the reply. The following is the substance of the answer to which this paragraph of the reply applied, to wit:

The second and third paragraphs of the answer allege, in different ways, the following material averments: That, prior

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States District Court for the State of Indiana against said Shipp to have him declared a bankrupt. He was so declared and adjudged by said court.

On the 30th day of April, 1874, the assignee of said bankrupt filed his petition asking to sell said land free from all mortgages and liens, and the claim and interest of said defendants Bradford and wife, making them defendants thereto.

On the 27th day of August, 1875, the court ordered said land to be sold free from all mortgages and liens, and all claims of any interest or equity of any kind whatever of the defendants Chandler Bradford and Mary Bradford in and to the land in controversy, and that their claims and interest be forever barred and foreclosed.

On the 8th day of October, 1875, said land was so sold by a commissioner appointed by said court, and said appellee Russell became the purchaser for \$2,000. On the 11th day of February, 1876, said sale having been approved and confirmed by said court, said commissioner conveyed all the claim, right, title and interest of Joshua Shipp, Jane Shipp, Chandler Bradford and Mary Bradford in and to said land to said Russell.

On the 8th day of September, 1875, said Joshua Shipp received his final discharge in bankruptcy.

On the 8th day of February, 1876, said Bradford proved in said United States District Court his claim for a breach of the warranty in his said deed; and on the 24th day of November, 1876, received his distributive share thereon of the assets of said bankrupt's estate. On the 21st day of June, 1876, said appellee conveyed the land in controversy to said Joshua Shipp, and took the notes in suit for the purchase-money, dated June 20th, 1876, and the mortgage in suit to secure their payment, dated August 2d, 1876.

On the 19th day of April, 1877, said Bradford brought a suit against said Shipp, in the Shelby County Circuit Court, to quiet his title to said land, which, on the 3d day of December, 1878, was decided by said court in his favor. And on

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the 18th day of July, 1877, said Shipp brought a suit of ejectment in said court against said Bradford, which was also decided in said Bradford's favor. That appellee Russell was not made a party to either of said suits. And on the 6th day of November, 1878, this suit was commenced.

The demurrer to the complaint stated as the only cause, a want of sufficient facts.

The first objection to the complaint, under the assignment of error in overruling the demurrer, is, that the allegation that Bradford then had possession of the said tract of land, and claimed an interest therein, was too general, and did not state what interest Bradford claimed. There was no motion made to make it more specific. If he claimed no interest, he could have filed a disclaimer and gone out of the case. If he claimed an interest, he had a right to set that interest up specifically in an answer, which he did.

Under a demurrer, it is sufficient, in a complaint to foreclose a mortgage, to aver that a defendant has or claims some interest in the mortgaged premises, in order to require him to answer as to that interest. 2 Jones Mortgages, section 1396; *Martin v. Noble*, 29 Ind. 216; *Bowen v. Wood*, 35 Ind. 268; *Bloomer v. Sturges*, 58 N. Y. 168. For the same reasons, we think the second, third and fourth objections to the complaint are not well taken. The last objection is, that although the complaint avers that "copies of each of which said notes and mortgage are filed herewith and made part hereof," but no copies thereof are attached to or filed with the complaint. This omission in the record has since been properly supplied by *certiorari*.

We see no error in overruling the demurrer to the complaint.

The second assignment of errors is upon overruling the demurrer to the second paragraph of the reply. The following is the substance of the answer to which this paragraph of the reply applied, to wit:

The second and third paragraphs of the answer allege, in different ways, the following material averments: That, prior

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to the execution of the mortgage sued on, Shipp, who was the possessor and owner of the land described in the complaint, by his warranty deed conveyed the same to Bradford and put him in the possession thereof; that he has ever since remained in the exclusive, open, notorious and adverse possession thereof, claiming title thereto; that afterward Shipp was adjudged a bankrupt; that such proceedings were had in the bankrupt court, that the land in controversy was ordered sold to pay a mortgage on the land made prior to the conveyance aforesaid; that the land was thereupon sold and conveyed to said Russell; that afterward, and while Bradford was so in possession thereof, Russell conveyed said land to Shipp, who thereupon executed the mortgage in suit. In addition to these averments, the second paragraph charges a conspiracy on the part of Russell and Shipp to defraud Bradford of his title; and the third paragraph alleges an agreement between them, by which Russell bought the land in trust for Shipp, loaning Shipp the money for such purchase, and was to afterwards convey the land to Shipp. In this paragraph it is averred that, when Shipp received said conveyance from Russell, the title vested in, and enured to the benefit of, Bradford.

The fourth paragraph omits the allegations of fraud and trust agreement aforesaid, and treats the conveyance to Shipp and the mortgage as void for maintenance.

The fifth paragraph, after setting out the conveyance as aforesaid, alleges that, after the execution of the mortgage in suit, Shipp brought his action in the circuit court of Shelby county, against Bradford, in ejectment, for the possession of said land; that he answered and claimed title thereto by virtue of the deed from Shipp in 1871, and that a judgment was rendered in his favor in said action.

The sixth paragraph is similar, except that it avers that Russell, when he conveyed the land to Shipp, represented that he would convey the title to Shipp, who would get possession thereof by means of said conveyance; by reason of which representations Shipp purchased the land, but had neither ob-

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tained title nor possession of the lands; that prior thereto Bradford brought his action in the Shelby Circuit Court to quiet his title to said land; that in said action Shipp claimed title thereto by virtue of the deed from Russell; which was decided in Bradford's favor.

The seventh paragraph alleges the conveyance while Bradford was in the possession as aforesaid, and that when Shipp received said conveyance from Russell the title so attempted to be conveyed related back and enured to the benefit of Bradford, and that, therefore, the mortgage is void.

The eighth paragraph contains similar allegations, and further avers that after the execution of the mortgage, Bradford brought his action in the Shelby Circuit Court against Shipp to quiet the title to said land, and in said action the title to said real estate by the conveyance to Bradford, in 1871, and by the deed from Russell to Shipp, in 1876, was passed upon and settled, including the proceedings in bankruptcy; and the title thereto was adjudged to be in Bradford.

The substance of the second paragraph of the reply, to which the demurrer was overruled, is as follows: In 1871, Joshua Shipp, being the owner of the land in the complaint described, mortgaged it to one Harvey Lewis, and that the mortgage was duly recorded; that afterward Joshua Shipp deeded it to Bradford; that Shipp was, in 1872, duly adjudged a bankrupt, and was afterward discharged; that the mortgage to Lewis was foreclosed, Bradford being a party defendant, and the land sold on decree to Russell; that Bradford proved his claim for breach of warranty in his deed from Shipp against Shipp's estate in bankruptcy, and in said claim asserted under oath that he had been dispossessed of the land in the mortgage described, which claim was allowed by the court, and on which Bradford received his dividend. And it expressly denied all charges of fraud and conspiracy; that the deed by Russell to Shipp, and the mortgage by Shipp to Russell, were made at the same time and were one and the same transaction.

It will be observed that adverse possession is only claimed

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from the date of the deed from Shipp to Bradford. The reply shows that the equity of the mortgage runs back of that date; that the whole claim out of which the mortgage in suit grows rests on the mortgage to Lewis, which was prior to the deed to Bradford by Shipp. And, in addition to this, Bradford was a judgment defendant in the foreclosure suit of the Lewis mortgage, and it is well settled that the possession of the judgment defendant after the sheriff's sale is not adverse to the purchaser. *Foust v. Moorman*, 2 Ind. 17; *Webb v. Thompson*, 23 Ind. 428; *Vannoy v. Blessing*, 36 Ind. 349.

Russell's title related back to the date of the Lewis mortgage, and was prior and paramount to Bradford's title; therefore, Bradford was holding possession under title derived under Russell's title, subject to and not adverse to Russell's title.

It is a correct principle of the law, that, where a person makes a warranty deed to another for real estate, to which he has no title, or an imperfect title, and he afterward acquires title, or perfects his title, the acquired or perfected title enures to the benefit of his grantee in his warranty deed.

It would be needless to cite authorities upon that general proposition. In this case Shipp had conveyed the title to Bradford, but that title was subject to the Lewis mortgage, and, if Shipp had removed the mortgage, it would have enured to the benefit of Bradford. He did not do this. The land was sold freed from the mortgage. Bradford and wife were made parties to the proceeding, and the property was sold by the order of the court. Russell bought the land free from Bradford's claim, and his right to redeem was forever barred and foreclosed. Shipp was declared a bankrupt, and discharged from all liability for any provable claims. Bradford proved his claim, and received his dividend. That the deed from Russell to Shipp and the mortgage from Shipp to Russell were one and the same transaction. These facts are all shown by this paragraph of the reply. We think the deed from Russell to Shipp did not enure to Bradford's benefit. All his claim to that benefit had been extinguished by Shipp's bankruptcy and dis-

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charge, and Bradford's proof of claim and acceptance of dividend. United States R. S., section 5119; *Bates v. West*, 19 Ill. 134; *Bailey v. Moore*, 21 Ill. 165; *Shelton v. Pease*, 10 Mo. 473; *Reed v. Pierce*, 36 Me. 455; *Jemison v. Blowers*, 5 Barb. 686; *Bush v. Person*, 18 How. 82. But if it did enure to Bradford's benefit, the land would still be subject to appellee's mortgage for the purchase-money, executed at the same time of the deed. Bradford could not hold the land freed from the mortgage for the purchase-money, which enabled it to get into a condition to enure to his benefit. As to the two suits between Bradford and Shipp, in the Shelby Circuit Court, they were both about other matters than the appellee's notes and mortgage, and did not embrace them in any particular, and he, not being a party thereto, was not in any shape, form or manner, bound thereby. *Wells Res Adjudicata*, sec. 182; 1 *Greenl. Ev.*, sec. 536; *Maple v. Beach*, 43 Ind. 51; *Glenn v. The State*, 46 Ind. 368.

We think the second paragraph of the reply was sufficient, and there was no error in overruling the demurrer to it. But this demurrer can not reach back and be sustained to the answer. While a separate demurrer to each paragraph of the answer might have been correctly sustained to some of them, others are good, and this demurrer, if sustained as to the answer, could only be sustained as to the whole answer.

Under the third assignment of errors, the overruling of the motion for a new trial, it is insisted, that the finding of the court was contrary to law, because it was not supported by sufficient evidence. We have heretofore considered the questions of adverse possession and Shipp's title enuring to the benefit of appellant, and do not desire to further discuss them. We think the evidence supported the finding, and that it was not contrary to law.

It is further insisted, under the motion for a new trial, that there was irregularity in the trial, in the court's admitting in evidence the transcript of the bankruptcy proceedings; and the objection to this was, that it was not properly authenti-

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cated ; that it only had the certificate of the clerk with the seal of the court attached to it ; that it ought to have had, in addition, the seal of the chief justice or one or more of the judges, or the presiding magistrate ; that the person who signed the attestation or certificate was, at the time of subscribing it, the clerk or prothonotary of the court, and that the attestation was in due form of law. And we are referred to the 286th section, 2 R. S. 1876, p. 152. This section is almost a literal copy of the 9th section of the act of Congress upon the subject of authenticating records of another State to be used as evidence in this State, and does not apply to the records in this State. In the case of *Adams v. Lisher*, 3 Blackf. 241, it was held that the transcript of a record of the District Court of the United States for this State, under the seal of the court, and certified by the clerk to be a complete copy of the record, is admissible as evidence in the courts of this State. This decision was based upon general principles, and not upon any statute of the State. And the act of Congress upon the authentication of records, although passed in 1790 and in force, was not referred to, we presume, for the reason that it did not embrace transcripts of records in a State where the transcript was to be used as evidence.

In the case of *Draggou v. Graham*, 9 Ind. 212, this court used the following language: "There is no certificate of any judge of any court, attached to the transcript, in accordance with the provision of the act of Congress touching the authentication of judgments of courts of record of the different States, when used as evidence out of that in which they were rendered ; and which provision has been substantially incorporated into our code. 2 R. S. p. 93, sec. 286."

This was a transcript from a justice of the peace's record, in the State of Ohio, certified to by the justice and the clerk of the common pleas court of the county. And upon the ground that there was nothing showing that a justice of the peace court was a court of record in the State of Ohio, it was held that the transcript was not embraced in the act of Con-

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gress nor in the 286th section of our statute, and was admissible as evidence. We make this quotation for the purpose of showing that section 286 of our statute is substantially the same as section 9 of the act of Congress. There is no ambiguity about this section in the act of Congress. But this section in our statute has been drawn in somewhat confused language, and it is remarkable that it should have so long remained in that condition. It commences as follows: "The records and judicial proceedings of the several courts of record, of or within the United States or the territories thereof, shall be admitted in the courts within this State as evidence, by attestation or certificate of the clerk or prothonotary, and the seal of the court annexed, together with the seal of the chief justice or one or more of the judges," etc. It is evident that the word "seal" of the chief justice or one of the judges is used for the word "certificate." And the words, "of or within the United States or the territories thereof," evidently mean other than this State; as is plainly set forth in the act of Congress. This case, in 9 Ind., *supra*, is approvingly cited in the case of *Ault v. Zehering*, 38 Ind. 429.

We think the transcript in question was admissible in evidence under the 283d section of our statute, which reads: "Exemplifications or copies of records," etc., "which are kept in any public office in this State, shall be proved or admitted as legal evidence in any court or office in this State, by the attestation of the keeper of said records," etc.; "and the seal of office of said keeper thereto annexed," etc.

A transcript of a record of the proceedings of the District Court of the United States, held within this State, requires no other or different authentication, in order to admit it in evidence in any court within this State, than a transcript of a record of the proceedings of any State circuit court held within this State. The United States courts held within this State are domestic courts, and not foreign.

In the case of *Turnbull v. Payson*, 95 U. S. 418, we find the following language: "Beyond all doubt, the certificate

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MORTGAGE.—*Foreclosure.*—*Real Estate.*—*Complaint.*—*Claim of Interest.*—In a complaint to foreclose a mortgage on real estate, an averment that a defendant has, or claims to have, some interest in the mortgaged premises, is sufficient on demurrer without specifying the interest he has or claims.

SAME.—*Vendor and Purchaser.*—*Answer.*—*Reply.*—*Prior Mortgage.*—*Bankruptcy.*—Where the answers to such complaint, among other things, aver that the owner of the land conveyed it to the defendant by warranty deed, and put him in possession thereof, and, becoming bankrupt, the land was sold to pay a prior mortgage and conveyed to one who conveyed it to his grantor, who thereupon executed to plaintiff the mortgage in suit; that his grantor and the plaintiff conspired to defraud him of his title; that the purchase was made in trust for his grantor and the title enured to the benefit of the defendant; that, in an action of ejectment between his grantor and himself, the defendant prevailed; that, in an action against his grantor to quiet his title, the defendant also had judgment,—a reply that the defendant was a party to the decree of foreclosure under which the land was sold to plaintiff, proved his claim in bankruptcy by his oath that he had been dispossessed of the land described in the mortgage, and upon its allowance received his dividend, is good on demurrer.

SAME.—In such case the title so acquired by the grantor does not enure to the benefit of his grantee.

SAME.—*Possession.*—The possession of the judgment defendant after sheriff's sale is not adverse to the purchaser.

SAME.—*Parties.*—A mortgagee, who was not a party to actions of ejectment and to quiet title between persons claiming the mortgaged premises, is not bound by the decrees.

SAME.—*Evidence.*—In such case, in his foreclosure proceedings, transcripts of the decrees are not admissible in evidence.

EVIDENCE.—*Bankruptcy.*—*Record of District Court of United States.*—A transcript of a record of a bankruptcy proceeding in the District Court of the United States for the district of Indiana, is admissible in evidence in a court of this State, under section 283, 2 R. S. 1876, p. 150, when proved by the attestation of the keeper of such record and the seal of the court.

From the Marion Circuit Court.

T. B. Adams, L. T. Michener, B. F. Love, W. Morrow and N. Trusler, for appellants.

J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellee.

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FRANKLIN, C.—This is an action commenced by Russell against Joshua Shipp, Jane Shipp and Chandler Bradford.

The action is based upon a note executed by Joshua, and a mortgage executed by Joshua and Jane, to secure the payment of the note. The complaint alleges that Bradford held possession of the mortgaged premises and claimed an interest in the land, making him a co-defendant to answer as to his interest.

The suit was commenced in the Shelby County Circuit Court, and the venue changed to Marion county, where the cause was tried. Shipp and wife appeared and answered, but afterward withdrew their answers and were defaulted. Bradford demurred to the complaint; demurrer overruled and an exception. He then answered in eight paragraphs, to which Russell replied in two paragraphs. Demurrer to second paragraph of reply overruled, and exception reserved. Trial by the court and finding for the plaintiff. Motion for a new trial overruled, and ruling excepted to. Motion in arrest of judgment overruled and exception taken, and judgment rendered for the plaintiff for \$2,553.76, and foreclosure of mortgage.

The defendant Bradford alone appeals to this court from the judgment of foreclosure of the mortgage as to him; and he has filed the following assignment of errors:

- 1st. Overruling demurrer to complaint;
- 2d. Overruling demurrer to second paragraph of reply;
- 3d. Overruling motion for a new trial;
- 4th. Overruling motion in arrest of judgment.

The facts in this case, as we gather them from the record, are as follows:

On the 1st day of May, 1871, said Joshua Shipp and wife executed a mortgage to one Lewis on certain lands in Shelby county, Indiana, including the land in dispute, for \$20,000.

On the 29th day of September, 1871, he conveyed the land in dispute, by warranty deed, to appellant Bradford.

On the 26th of June, 1872, a petition was filed in the United
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States District Court for the State of Indiana against said Shipp to have him declared a bankrupt. He was so declared and adjudged by said court.

On the 30th day of April, 1874, the assignee of said bankrupt filed his petition asking to sell said land free from all mortgages and liens, and the claim and interest of said defendants Bradford and wife, making them defendants thereto.

On the 27th day of August, 1875, the court ordered said land to be sold free from all mortgages and liens, and all claims of any interest or equity of any kind whatever of the defendants Chandler Bradford and Mary Bradford in and to the land in controversy, and that their claims and interest be forever barred and foreclosed.

On the 8th day of October, 1875, said land was so sold by a commissioner appointed by said court, and said appellee Russell became the purchaser for \$2,000. On the 11th day of February, 1876, said sale having been approved and confirmed by said court, said commissioner conveyed all the claim, right, title and interest of Joshua Shipp, Jane Shipp, Chandler Bradford and Mary Bradford in and to said land to said Russell.

On the 8th day of September, 1875, said Joshua Shipp received his final discharge in bankruptcy.

On the 8th day of February, 1876, said Bradford proved in said United States District Court his claim for a breach of the warranty in his said deed; and on the 24th day of November, 1876, received his distributive share thereon of the assets of said bankrupt's estate. On the 21st day of June, 1876, said appellee conveyed the land in controversy to said Joshua Shipp, and took the notes in suit for the purchase-money, dated June 20th, 1876, and the mortgage in suit to secure their payment, dated August 2d, 1876.

On the 19th day of April, 1877, said Bradford brought a suit against said Shipp, in the Shelby County Circuit Court, to quiet his title to said land, which, on the 3d day of December, 1878, was decided by said court in his favor. And on

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the 18th day of July, 1877, said Shipp brought a suit of ejectment in said court against said Bradford, which was also decided in said Bradford's favor. That appellee Russell was not made a party to either of said suits. And on the 6th day of November, 1878, this suit was commenced.

The demurrer to the complaint stated as the only cause, a want of sufficient facts.

The first objection to the complaint, under the assignment of error in overruling the demurrer, is, that the allegation that Bradford then had possession of the said tract of land, and claimed an interest therein, was too general, and did not state what interest Bradford claimed. There was no motion made to make it more specific. If he claimed no interest, he could have filed a disclaimer and gone out of the case. If he claimed an interest, he had a right to set that interest up specifically in an answer, which he did.

Under a demurrer, it is sufficient, in a complaint to foreclose a mortgage, to aver that a defendant has or claims some interest in the mortgaged premises, in order to require him to answer as to that interest. 2 Jones Mortgages, section 1396; *Martin v. Noble*, 29 Ind. 216; *Bowen v. Wood*, 35 Ind. 268; *Bloomer v. Sturges*, 58 N. Y. 168. For the same reasons, we think the second, third and fourth objections to the complaint are not well taken. The last objection is, that although the complaint avers that "copies of each of which said notes and mortgage are filed herewith and made part hereof," but no copies thereof are attached to or filed with the complaint. This omission in the record has since been properly supplied by *certiorari*.

We see no error in overruling the demurrer to the complaint.

The second assignment of errors is upon overruling the demurrer to the second paragraph of the reply. The following is the substance of the answer to which this paragraph of the reply applied, to wit:

The second and third paragraphs of the answer allege, in different ways, the following material averments: That, prior

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to the execution of the mortgage sued on, Shipp, who was the possessor and owner of the land described in the complaint, by his warranty deed conveyed the same to Bradford and put him in the possession thereof; that he has ever since remained in the exclusive, open, notorious and adverse possession thereof, claiming title thereto; that afterward Shipp was adjudged a bankrupt; that such proceedings were had in the bankrupt court, that the land in controversy was ordered sold to pay a mortgage on the land made prior to the conveyance aforesaid; that the land was thereupon sold and conveyed to said Russell; that afterward, and while Bradford was so in possession thereof, Russell conveyed said land to Shipp, who thereupon executed the mortgage in suit. In addition to these averments, the second paragraph charges a conspiracy on the part of Russell and Shipp to defraud Bradford of his title; and the third paragraph alleges an agreement between them, by which Russell bought the land in trust for Shipp, loaning Shipp the money for such purchase, and was to afterwards convey the land to Shipp. In this paragraph it is averred that, when Shipp received said conveyance from Russell, the title vested in, and enured to the benefit of, Bradford.

The fourth paragraph omits the allegations of fraud and trust agreement aforesaid, and treats the conveyance to Shipp and the mortgage as void for maintenance.

The fifth paragraph, after setting out the conveyance as aforesaid, alleges that, after the execution of the mortgage in suit, Shipp brought his action in the circuit court of Shelby county, against Bradford, in ejectment, for the possession of said land; that he answered and claimed title thereto by virtue of the deed from Shipp in 1871, and that a judgment was rendered in his favor in said action.

The sixth paragraph is similar, except that it avers that Russell, when he conveyed the land to Shipp, represented that he would convey the title to Shipp, who would get possession thereof by means of said conveyance; by reason of which representations Shipp purchased the land, but had neither ob-

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tained title nor possession of the lands; that prior thereto Bradford brought his action in the Shelby Circuit Court to quiet his title to said land; that in said action Shipp claimed title thereto by virtue of the deed from Russell; which was decided in Bradford's favor.

The seventh paragraph alleges the conveyance while Bradford was in the possession as aforesaid, and that when Shipp received said conveyance from Russell the title so attempted to be conveyed related back and enured to the benefit of Bradford, and that, therefore, the mortgage is void.

The eighth paragraph contains similar allegations, and further avers that after the execution of the mortgage, Bradford brought his action in the Shelby Circuit Court against Shipp to quiet the title to said land, and in said action the title to said real estate by the conveyance to Bradford, in 1871, and by the deed from Russell to Shipp, in 1876, was passed upon and settled, including the proceedings in bankruptcy; and the title thereto was adjudged to be in Bradford.

The substance of the second paragraph of the reply, to which the demurrer was overruled, is as follows: In 1871, Joshua Shipp, being the owner of the land in the complaint described, mortgaged it to one Harvey Lewis, and that the mortgage was duly recorded; that afterward Joshua Shipp deeded it to Bradford; that Shipp was, in 1872, duly adjudged a bankrupt, and was afterward discharged; that the mortgage to Lewis was foreclosed, Bradford being a party defendant, and the land sold on decree to Russell; that Bradford proved his claim for breach of warranty in his deed from Shipp against Shipp's estate in bankruptcy, and in said claim asserted under oath that he had been dispossessed of the land in the mortgage described, which claim was allowed by the court, and on which Bradford received his dividend. And it expressly denied all charges of fraud and conspiracy; that the deed by Russell to Shipp, and the mortgage by Shipp to Russell, were made at the same time and were one and the same transaction.

It will be observed that adverse possession is only claimed

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counsel, in regard to what was shown by the context, is utterly untenable, and is not sustained by the record.

The attorneys for the State further say: "Again, even if the question was a proper one, the appellant did not show what fact was expected to be elicited from the answer of the witness to the question propounded."

In the appellant's motion for a new trial, one of the causes assigned therefor was the alleged error of the circuit court in refusing to allow him to answer the question first quoted in this opinion. In his brief of this cause in this court, his learned counsel had earnestly insisted that, for this error, a new trial ought to have been granted. They said: "The court should have permitted the defendant on the stand, as a witness in his own behalf, to expressly deny what was not said, but hinted at all through the case, that the whipping was in fact because the child had attended a Protestant funeral. He was entitled to this full denial, without having to rely upon an inference to be drawn from an answer, that assigned another cause. Interwoven into the case and all through it, as presented by the prosecution, is the fact that the child attended a Protestant funeral and was whipped. Such a conclusion is to be reached, as the counsel for the State said in argument, 'to be read between the lines.' In a criminal prosecution we are not to read between the lines and disregard the sworn testimony that such was not the case."

On the original submission of this cause, the able attorneys for the State favored this court with an elaborate brief of ten closely printed pages. It is manifest therefrom, that, in its preparation, they had before them the brief of the appellant's counsel, from which we have quoted. The counsel for the State were well advised, therefore, that the appellant relied upon the error of the trial court in refusing to allow him to answer the question first quoted, for the reversal of the judgment. Yet the attorneys for the State, throughout their elaborate brief, did not allude even to the error in question.

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They did not then inform this court, as they now do for the first time in the petition for a rehearing, that the appellant, by omitting to state to the court the fact he expected to prove by the answer of the witness, had failed to save the error of the court in the record, in such manner as to make it available to him on his appeal to this court. Doubtless it is true, as a general rule, that, where a party may wish to avail himself, in this court, of an alleged error of the trial court in the exclusion of offered evidence, it is due to both courts that the record should clearly show that the party had stated to the trial court, before or at the time of the exclusion of such evidence, what it was and what fact or facts it was intended to establish thereby. *Mitchell v. Chambers*, 55 Ind. 289.

But, in the petition filed in this case, we are asked to grant a rehearing, in so far as this last point is concerned, in order that the State, by its attorneys, may present for decision the point which the attorneys ought to have made, but failed to make, on the original submission of the cause. The point now made is, *not* that the court did not err in excluding the offered evidence, but that the appellant failed to tell the court what fact he proposed to prove, and, therefore, he could not avail himself of the error in question. This court can not grant a rehearing to enable parties to make points, or present questions, which they ought to have made or presented before the decision of the cause. If rehearings were granted for such purposes, it would be difficult for this court to arrive at the final decision of cases; and, therefore, it has been uniformly held, as we now hold, that a rehearing will not be granted for any such purpose. *Graeter v. Williams*, 55 Ind. 461; *Rikhoff v. Brown's Rotary Shuttle S. M. Co.*, 68 Ind. 388; *The Board, etc., v. Hall*, 70 Ind. 469, on pages 476 and 477.

The petition for a rehearing is overruled.

Williams *et al.* v. Stoll.

No. 8823.

WILLIAMS ET AL. v. STOLL.

PROMISSORY NOTE.—*Commercial Paper.*—*Endorser and Endorsee.*—*Consideration.*—*Fraud.*—One who carelessly executes commercial paper, which he can not read, being deceived by the payee as to its character, and therefore supposing it to be an instrument wholly different, when, by reasonable care, he might have ascertained the true contents of the paper, can not make defence as to the consideration, against an innocent holder for value, who received the paper by endorsement, before maturity.

From the Dearborn Circuit Court.

D. H. Stapp and *J. A. Parks*, for appellants.

MORRIS, C.—The appellants, as assignees, brought this suit against the appellee, on the following note:

“June 26, 1878.

“Three months after date, I promise to pay to the order of George Stoll, one hundred and ninety-two dollars, at the First National Bank, Lawrenceburgh, Indiana, value received, with interest at ten per cent. per annum, without any relief from valuation or appraisal laws. And I promise to pay all attorney’s fees and cost and charges for the collection of this note. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note. The makers and endorsers of this note further expressly agree that the payee or his assigns may extend the time of payment thereof, from time to time, indefinitely, as he or they may see fit, and receive interest in advance or otherwise, from either the makers or endorsers, for any extension so made.

GEORGE STOLL.”

The note was alleged to have been endorsed by George Stoll to W. P. McCay, and by him endorsed before due, and for a valuable consideration, to the appellants, who aver that they are innocent holders of the note.

The appellee answered the complaint by a general denial, and he also answered it by a special paragraph, in which he alleged that he was a German by birth, who came to this coun-

try when forty-eight years of age ; that he was, at the time the note is alleged to have been given, sixty-eight years old ; that he could neither read nor write the English language, and spoke it very imperfectly ; that, on the 26th day of June, 1878, two strange men, whom he had never seen before, came to his house, in Logan township, in Dearborn county, one having red hair and the other having dark hair ; that he did not know their names ; that, when the strangers came, he and his two sons were at work in the field ; that they went to the house together ; that the red-haired man said they wanted to appoint an agent in that neighborhood to sell family medicines, prepared by the "Western Medical Works," at Indianapolis, and that they wished to appoint him to act as agent, and put up posters and sell the medicines. He told the strangers that he could not act as agent ; that he was old, and could not read nor write. The red-haired man then proposed that the appellee's son, Martin, should act as agent, and asked Martin how old he was, and was informed that he was a minor ; that he then proposed that said Martin should act as agent for the sale of said medicines in the neighborhood ; that they would give him a dollar and a half per day for his time spent in putting up posters to advertise the medicines, and a commission of twenty-five per cent. on sales made by him ; but, as Martin was a minor, his father, the appellee, must sign the agreement for him to act as such agent ; that the red-haired stranger stated to the appellee, that, if he accepted such agency for his son, he would not be required to pay any money unless his son, as such agent, made sales of said medicines, and that, if sales were made, he would only have to pay over the proceeds, less commissions and expenses, once in every three months to the First National Bank in Lawrenceburgh ; that if no sales were made there would be nothing to pay ; that the stranger who made these statements got the appellee's son, Martin, to go with the other stranger to the barn, under pretence of watering the horses, and then drew up the

Williams et al. v. Stoll.

papers, and stated to the appellee that the papers were simply to show that his son had accepted said agency, and that he was duly appointed agent of said company for the sale of said medicines, and that the money arising from such sales, after deducting commissions and expenses, should be paid into the First National Bank of Lawrenceburgh, at the end of every three months; that said papers did not require the appellee to pay any money, unless sales should be made; that thereupon, and upon such representations, he consented that Martin should act as such proposed agent; that he then signed two or three papers presented to him by said stranger; that if any of them was the note in suit he did not know it; that he signed said papers with the understanding that they related to said agency, and nothing else; that nothing was said at any time about a note, and that he would not have knowingly signed a note; that the strangers then left, and that he has not seen them since; that neither he nor his son ever received any of the medicines for sale; that, if his name is to the note, it was procured without his knowledge or consent, and by the false and fraudulent representations of the strangers.

Upon these facts the appellee demands judgment. Both paragraphs of the answer were verified.

The same facts stated in the special paragraph of the answer were set up by way of counter-claim, except that, in the counter-claim, the sons of the appellee are not stated to have been present at the time of the transaction. The counter-claim is verified.

The appellants demurred to the special paragraph of the answer and to the counter-claim. The court overruled the demurrers and the appellants excepted. The cause was tried by a jury; verdict and judgment for the appellee.

The rulings of the court upon the demurrers are assigned as errors.

The note sued on is commercial paper, and is governed by the law merchant. The appellants are alleged in the complaint to be innocent holders, for value. The note was, in

their hands, free from equities which the maker might have insisted upon as against any party having notice of such equities. It is very probable that the appellee was misled and imposed upon by the strangers to whom he delivered the note, but if, by his negligence or careless indifference to his own interests, he contributed to the imposition, or if, by the exercise of a prudent diligence and regard for his own rights, he might have protected himself, he should suffer rather than the innocent holder of his paper, carelessly issued by him.

It is not alleged in the special paragraph of the answer, that the sons of the appellee could not read and write the English language. The fair inference from the facts stated is, that Martin could do so. The appellee refused to accept the agency himself, mainly upon the ground that he could not read and write. He directed Martin to accept it, agreeing to sign the necessary papers, for the reason, we infer, that he could both read and write. It is stated, apparently by way of excuse, that one of the strangers had, under pretence of watering the horses, induced Martin to go with him to the barn, and that he was not, for this reason, actually present when the papers were executed. But, if at the barn, he was not so far away that he could not have been called. The men with whom the appellee was transacting the business were entire strangers to him; he knew nothing of them. He knew that he could not read. Common prudence would have suggested to the appellee, under the circumstances, the propriety of calling in his son and having him read the papers presented to him for execution. But this he did not do. Without asking the stranger even to read them, he blindly relied upon his statement as to their contents and meaning, and, as is not unfrequently the case, was deceived and imposed upon. He, and not the innocent holder of the note, must bear the consequence of his misplaced confidence. *Maxwell v. Morehart*, 66 Ind. 301; *Indiana National Bank v. Weckerly*, 67 Ind. 345.

We think the court below erred in overruling the demur-

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rer to the first paragraph of the answer. As the counter-claim is substantially the same as the special paragraph of the answer, the demurrer to it should have been sustained.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee.

No. 8760.**BOWMAN ET AL. v. MITCHELL.**

PROMISSORY NOTE.—Alteration.—Answer.—Married Woman.—Mortgage.—A verified separate answer of a married woman, that, with her husband, she executed the mortgage sued on to secure three notes; that one was paid; and that the other two, after their delivery to the payee, were unlawfully, and without her knowledge or consent, fraudulently altered by inserting in the body thereof "at ten per cent. interest," is good on demurrer.

SAME.—Whatever discharges a note discharges a mortgage securing it.

SAME.—Material Alteration.—A material alteration of a note or other written instrument, by one who claims the benefit of it, made without the consent of the party against whom it is to be enforced, renders it void; and inserting in a note a higher rate of interest than it provides for is a material alteration.

SAME.—Presumption.—The presumption is that a material alteration, made after the execution of a note or other written instrument, was made by the party claiming under it, or by one under whom he claims.

From the Henry Circuit Court.

J. Brown and D. W. Chambers, for appellants.

BICKNELL, C. C.—The appellants Bowman and wife mortgaged land to the appellant Snodgrass, to secure three notes given by Bowman to Snodgrass. One of the notes was paid.

Afterward, Snodgrass, by delivery merely, assigned said mortgage and the other two notes to the appellee, who brought this suit thereupon against Bowman and wife, making Snodgrass a defendant as assignor, and Amos Heston and wife defendants, as claiming some interest in the land.

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The appellant Mary Bowman answered separately, that she executed the mortgage to secure said notes, and that one of them was paid, and that the other two, after the delivery thereof to the payee, were unlawfully, and without her knowledge or consent, fraudulently altered by inserting in the body thereof "at ten per cent. interest." This answer was duly verified.

A demurrer by the appellee to this answer was sustained, and judgment was rendered upon the demurrer.

The cause was tried by the court upon the issues joined, as to the appellant Edward Bowman. Snodgrass and Heston and wife were defaulted; judgment of foreclosure was rendered against all the defendants, and they joined in this appeal.

A mortgage given to secure a void note can not be enforced. Whatever discharges a note discharges a mortgage which secures it. *Sherman v. Sherman*, 3 Ind. 337.

A material alteration of a written instrument, by one who claims the benefit of it, made without the consent of the party against whom it is to be enforced, renders it void. *Bowser v. Rendell*, 31 Ind. 128; *Bowers' Adm'r v. Briggs*, 20 Ind. 139; *Holland v. Hatch*, 11 Ind. 497; *Coburn v. Webb*, 56 Ind. 96; *Schnewind v. Hackett*, 54 Ind. 248; *Franklin L. Ins. Co. v. Courtney*, 60 Ind. 134; *Collier v. Waugh*, 64 Ind. 456; *McCoy v. Lockwood*, 71 Ind. 319; *Dietz v. Harder*, 72 Ind. 208.

When an instrument is altered after its execution, it will be presumed, until the contrary is shown, that the alteration was made by the party claiming under it, or by one under whom he claims, and it is not necessary, in an answer stating that an instrument sued on has been altered, to allege that it was altered by the party claiming under it, or by one under whom he claims. *Cochran v. Nebeker*, 48 Ind. 459.

Inserting in a note a higher rate of interest than it provides for is a material alteration. *Shanks v. Albert*, 47 Ind. 461.

The foregoing authorities show that the alteration of the notes alleged in the separate answer of the appellant Mary Bowman, avoided the notes and made the mortgage unavail-

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able as against her husband, Edward Bowman, and therefore unavailable against his wife.

The court erred in sustaining the demurrer to the separate answer of Mary Bowman. The judgment ought to be reversed as to the said Mary Bowman and affirmed as to the other defendants, and the cause remanded, with instructions to overrule the demurrer to said separate answer.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, as to the said Mary Bowman, and affirmed as to the other defendants, at the costs of the appellee, and this cause is remanded, with instructions to overrule the demurrer to the separate answer of said Mary Bowman, and for further proceedings as to her.

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162 601

No. 9626.

PEED ET AL. v. MILLIKAN, TREASURER, ET AL.

RAILROAD.—Appropriation to Aid.—Statutes Construed.—The power of counties and townships to vote aid to railroad companies is conferred and regulated by the act of May 12th, 1869, and the supplemental and amendatory acts of January 30th, 1873, and March 11th, 1875.

SAME.—Tax.—Levy.—Percentage or Gross Sum.—The levy of a tax in aid of a railroad company is not void because made in the shape of a *percentage* instead of a gross sum.

SAME.—Defective Levy.—County Commissioners.—Power to Correct.—If the order for the levy of a tax voted in aid of a railroad company is defective, it may be corrected at any time by the board of commissioners on application, or of its own motion. Though the law requires the levy to be made at the June session next after the vote, the duty to make it is absolute, and consequently the power to make it is not lost by a failure to exercise it at the right time.

SAME.—Tax Placed on Duplicate Too Soon Enjoined.—The law forbids the placing of a tax levy in aid of a railroad company upon the duplicate until the road has been permanently located in the county or township

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which voted the same; and the collection thereof may be enjoined and the levy ordered stricken from the duplicate, notwithstanding the road may have been since located in the county or township which voted the aid. *SAME.—Power of Auditor and Treasurer to Suspend Tax.*—The provisions of the laws whereby the auditor and treasurer are required to suspend the collection, and to carry the tax forward until the road has been located and money expended, etc., have reference to levies which had gone upon the duplicate before the inhibition against placing the tax on the duplicate until the road has been located was enacted.

From the Henry Circuit Court.

M. E. Forkner, B. Harrison, C. C. Hines and W. H. H. Miller, for appellants.

J. H. Mellett and E. H. Bundy, for appellees.

WOODS, J.—Action by the appellants as taxpayers of Henry township, Henry county, Indiana, against the appellees, to have a certain tax levy, in aid of the construction of a railroad, declared illegal and void, and to have the appellee Millikan, treasurer of the county, restrained from enforcing the collection of the tax so levied.

Not disputing the regularity and validity of the election whereby the township voted for the levy of the tax, the plaintiffs allege in their complaint, that, at the regular June session, in 1880, of the board of commissioners of Henry county, the following entry and order were made, to wit:

“In the matter of Railroad Appropriation by Henry Township: It appearing to the satisfaction of the board of commissioners, that, at the railroad election held in Henry township, Henry county, Indiana, on the 21st day of February, 1880, pursuant to the order of said board made on the 19th day of January, 1880, a majority of the votes cast were in favor of the appropriation of the sum of twenty thousand dollars (\$20,000) to aid in building the New Castle and Rushville Railroad. Now, therefore, it is ordered by the board of commissioners of Henry county, Indiana, that the prayer of the petitioners heretofore filed, asking said appropriation, be, in all things, granted; and it is further ordered that a special

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tax be, and the same is hereby, levied of 102-100 per cent. upon all the real and personal property in said township liable to taxation for State and county purposes, or, in other words, a sufficient per cent. of the taxable property of said Henry township to raise the said \$20,000 appropriation; and it is further ordered that the half of one per cent. of said taxable property, or fifty-two cents per each one hundred dollars, be placed upon the tax duplicate of said Henry township for the year 1880, and 52-100 per cent. being more than one-half of said appropriation, to be collected in all respects as other taxes are collected for State and county purposes, upon the company complying with the statutes in this behalf."

The plaintiffs further aver, that in pursuance of this order there was placed on the tax duplicate of said township for the year 1880, 52-100 of one per cent., being more than one-half of the said appropriation; that neither at the time when the vote for the appropriation was taken, nor when the order of the board was made, nor when the levy was ordered, nor when the tax was placed upon the duplicate, had said railroad been located, nor was it known whether it would run through said township or not; and as a matter of fact said road was never located until about the 1st day of January, 1881, long after the tax was placed on the duplicate and the duplicate had passed into the hands of the defendant, the treasurer of the county; that no work in the way of constructing the road has been done, nor has twenty thousand dollars or any other sum been expended on the work, in said township; that the board of commissioners had no right or authority to levy said tax of 102-100 per cent. at the time when the same was levied, and no authority to place said tax or any part thereof on the duplicate before the railroad had been permanently located, and that the levy, whether the same be 102-100 or 52-100 of one per cent. is illegal and void.

That the defendant, the treasurer, is now demanding of the plaintiffs and other taxpayers of the township, payment of said tax with other taxes, and insists that the same is now due

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and payable; that they have paid the instalments of all other taxes against them which are due and collectible, but said treasurer refuses to give receipts unless said special tax shall also be paid, and is threatening to treat the second instalment of taxes against the property of the plaintiffs as delinquent unless this special tax shall be paid on or before the the third Monday of April, 1881; that said special tax, so placed upon the duplicate and standing charged against the property of the plaintiffs and other taxpayers of the township, is a cloud upon their titles.

Upon these averments and other formal allegations, which need not be particularized, the plaintiffs pray that the levy and the placing of the same on the duplicate be declared illegal and void, the treasurer restrained and their titles quieted.

To this complaint the court sustained a demurrer for want of facts, and the appellants, abiding their exception, refused to amend.

The power of counties and townships to vote aid to railroad companies is conferred and regulated by the act of May 12th, 1869, and the supplemental act of January 30th, 1873, of which the second section was amended by the act of March 11th, 1875. 1 R. S. 1876, p. 735-740.

The twelfth section of the first named act is as follows:

"Sec. 12. If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at their ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax of at least one-half the amount specified in said petition, but not exceeding one per centum upon the real and personal property in the county or township, as the case may be, liable to taxation for State and county purposes, which tax shall be collected in all respects as other taxes are collected for State and county purposes; and if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said board of county commissioners at the June session of the following year."

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The supplemental act of 1873, as amended in 1875, is as follows:

"Section 1. *Be it enacted, etc.*, "That no tax shall be placed upon the duplicate of any county for the purpose of taking stock or making donations to railroad companies, by any county or township, pursuant to the provisions of an act entitled 'An act to authorize aid,' etc., "approved May 12th, 1869, until such railroad shall have been permanently located in the county or township making the donation or taking the stock."

"Section 2." (As amended in 1875) "That in all cases where stock has been taken or donations made by any county or township, for the purpose of aiding in the construction of any railroad, pursuant to the above entitled act, and the special tax authorized thereby has been placed upon the duplicate of the proper county for collection, the auditor and treasurer of such county shall suspend the collection of such tax, but the same shall be carried forward on the duplicate, without being returned delinquent, until such railroad is permanently located in such county or township, and has expended an amount of money, in the actual construction of such railroad in such county or township, equal to the amount of money to be donated to or stock to be taken in the said railroad company by said county or township, and if said railroad company shall not, within five years" (three years in act of 1873) "after said tax has been placed upon the duplicate for collection in the proper county, have expended, in the actual construction of said railroad in said county or township, an amount of money equal to the amount of money to be donated to, or stock to be taken in said railroad company by said county or township, the board of commissioners may, in their discretion, make an order annulling and cancelling such subscription of stock or donation of money, upon the application," etc. "*Provided, further*, That whenever it is shown to the satisfaction of the board of commissioners that the amount of work done, by any railroad company in any county or township taking stock in, or donating money to such railroad company, is equal to the

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stock taken, or donation made, it shall be the duty of the board of commissioners to order said tax to be collected at once, as though the same had never been suspended: *And provided further*, That the provision of this act shall not apply to any railroad, in any case, where three years or more have elapsed since the tax, in aid thereof, shall have been placed on the tax duplicate for collection."

The last proviso was not in the act of 1873, and in that act it read "three years" instead of "five years," as indicated. Except in these particulars the original section 2 was the same as the amended section, *supra*.

Whether the levy, or the order therefor, which, it must be confessed, is unskillfully drawn, is invalid on account of uncertainty, we do not find it necessary to decide. Taking the entire order into consideration, we incline to the opinion that it may be treated as showing a levy of fifty-two-hundredths of one per cent., and that it is not void because made in the shape of a per cent. instead of a gross sum. Assuming, as counsel for the appellants contend, that the levy must be deemed to have been made upon, or with reference to, the duplicate of the preceding year, it is a percentage upon a definite and known sum, or sums, and the total amount is as certain as if the aggregate had been stated in figures. *Id certum est, quod certum reddi potest*.

This question, however, is comparatively of slight importance. If the order for the levy is defective, it is a matter within the power of the board of commissioners, at any time, on application, or of its own motion, to correct. The law indeed requires the levy in such cases to be made at the June session of the board next after the vote was had, but the duty to make it, if regularly voted, is absolute; and if, for any reason, there is a failure to make it at the prescribed time, the power to make it is not thereby lost, and may be exercised afterward. See *Sackett v. The State, ex rel.*, 74 Ind. 486.

As we have seen, it is the express requirement of the first section of the supplemental act of 1873, that no such tax shall

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be placed on the duplicate until the railroad shall have been permanently located in the county or township making the donation or taking the stock. The complaint under consideration shows that, in disregard of this inhibition, the levy was carried onto the duplicate, and that the treasurer is threatening to proceed as if the tax had come properly upon the duplicate.

It is no answer to this that the road has since been located in the township, and that, by the second section of that act, as amended in 1875, the auditor and treasurer are required to suspend the collection, and to carry the tax forward on the duplicate until the railroad has been located, and money expended in its construction, in the county or township, equal to the amount of the donation, etc., and that, upon proper proof, in these respects, the board of commissioners is required to order the tax collected. These provisions do not modify or affect the meaning of the first section of the act, which applies only to taxes voted or levied after the passage of the act, or which, at least, had not yet been put upon the duplicate; while the provisions of the second section, in its original as well as amended form, refer mainly, if not entirely, to levies which had been placed on the duplicate before the act took effect. Under the first section, the placing of the particular tax in question upon the duplicate, assuming the validity of the order for the levy, was premature and unlawful. The complaint shows the fact, and, if true, entitles the appellants to a judgment or decree, declaring the duplicate illegal in respect to that tax, and restraining the treasurer from proceeding to collect it.

Judgment reversed, with costs, and cause remanded, with instruction to overrule the demurrer to the complaint.

Brown v. Cain.

No. 8369.

BROWN v. CAIN.

FORMER RECOVERY.—Evidence.—The best test of identity where a former adjudication of the same matter is pleaded is, would the same evidence sustain both the present and the former suit?

JUDGMENT.—Justice of the Peace.—Jurisdiction.—A judgment of a justice of the peace on default for \$200, where it appears that the note on which it was rendered would, with the interest, exceed \$200, but where it does not appear that the plaintiff claimed more than \$200, nor that there were not credits on the note, can not be held void, for want of jurisdiction.

From the Gibson Circuit Court.

C. A. Buskirk, for appellant.

R. M. J. Miller, for appellee.

WORDEN, J.—Action by Cain against Brown. Judgment for the plaintiff.

Cain and Pierce W. Noland had been in partnership. Cain sold out his interest in the partnership business and assets to Noland, the latter agreeing to pay the debts of the firm. Noland, and Brown as his surety, executed a bond to Cain conditioned for the payment of the partnership debts. This action was brought on the bond against Brown, Noland having died insolvent.

A breach of the condition of the bond is alleged, as follows:

“And plaintiff says said defendants have made default in the condition of said bond, and have not paid all the liabilities of said firm of Noland & Cain, but that this plaintiff has been compelled to and has paid a large amount of said indebtedness, to wit: A certain debt due to Keller & White, of Evansville, Indiana, from said Noland & Cain, which was one of the liabilities of said Noland & Cain, so agreed to be paid by said Noland, and upon which this plaintiff has been compelled to and has paid the full sum of one hundred and eighty-three and 48-100 dollars.”

The defendant answered, *first*, by a general denial; and, *second*, a former recovery in his favor, in an action against him by

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the plaintiff herein, in the Gibson Circuit Court, for the same cause of action. Reply in denial of the second paragraph.

Trial by the court, finding for the plaintiff and new trial denied.

The case is here upon the evidence, in which there does not appear to be any conflict, and the question is whether the answer of former recovery was not made out.

The defendant gave in evidence the record of the recovery pleaded, in an action in the Gibson Circuit Court by the plaintiff herein against him, on the same bond in suit in this action.

The breach in the condition of the bond assigned in the former action was the same in substance as in the present, except that the indebtedness of the firm to Keller & White, which the plaintiff had been compelled to pay, was described as a judgment against Noland & Cain in the Gibson Circuit Court, rendered on one of the liabilities of Noland & Cain.

In the former action Brown answered, *first*, by general denial; and, *second*, that the bond sued on was executed by him without any consideration. A demurrer to the second paragraph having been overruled, a reply was filed and the cause was submitted to the court for trial, resulting in a finding and judgment for the defendant.

The record in the present action does not show what the evidence in the former action was, nor the ground upon which the defendant in that action recovered.

It seems to us to be clear that the defence of former recovery was well made out.

In the complaint in the present action the claim of Keller & White against the firm is described as a debt. This is broad enough to cover a judgment or a debt of any other character. In the former action it is described as a judgment in the Gibson Circuit Court.

The evidence tended to show that the claim of Keller & White against the firm was a judgment rendered by a justice of the peace, and that a transcript of it had been filed in the

Brown v. Cain.

office of the clerk of the Gibson Circuit Court, who had issued an execution upon it, as contemplated by sections 539, 540 and 541 of the code of 1852, and that the plaintiff had paid the money to the sheriff on the execution. There was no material variance between this evidence and the allegations of the complaint in the former action. Code 1852, section 94.

This evidence would have sustained either the present or former action, so far as this point in the two cases is concerned.

In Freeman on Judgments, 3d ed., section 259, it is said: "The best and most invariable test as to whether a former judgment is a bar, is to enquire whether the same evidence will sustain both the present and the former action. If this identity of evidence be found, it will make no difference that the form of the two actions is not the same."

But it is claimed by the counsel for the appellee, as we understand his brief, that the judgment rendered by the justice was void for want of jurisdiction, and, therefore, the plaintiff could not have recovered in the former action, but might in the present on the theory that the claim of Keller & White had not been reduced to judgment.

The evidence shows that the plaintiff paid the claim to the sheriff upon execution issued upon the judgment. The case was not made out of payment upon any other claim.

But we can not say that the judgment was void. It was a judgment by default, on due service of summons, for two hundred dollars, rendered on a promissory note as the cause of action. The note was for a little less than two hundred dollars, but there appeared from the face of it, with the interest, to be a little more than that sum due at the time of the rendition of the judgment. But we can not say how much or whether anything was credited upon it.

It does not appear that the plaintiffs in that action claimed more than two hundred dollars.

The judgment recites that "The plaintiffs, having made

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proof of their complaint in the sum of two hundred dollars due on said note, it is therefore considered," etc.

The motion for a new trial should have prevailed.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

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 No. 8359.

KITCH v. OATIS.

NEW TRIAL.—*Newly Discovered Evidence.*—*Diligence.*—*Practice.*—*Proof of Complaint.*—Upon the hearing of a complaint for a new trial, under section 356, 2 R. S. 1876, p. 183, the plaintiff should produce in evidence the record of the former trial and the evidence then given, with the newly discovered evidence pleaded, and prove that it was discovered after the term, and show what diligence he had used to procure the same at the former trial.

SAME.—*Bill of Exceptions.*—*Supreme Court.*—In such case, the evidence produced by the parties at the hearing and summary decision should be incorporated in the record by a bill of exceptions, to enable the Supreme Court to determine the correctness of the decision of the trial court in granting or refusing the new trial.

From the Grant Circuit Court.

E. Kitch, for appellant.

MORRIS, C.—The appellant filed his complaint in said court for a new trial, under section 356 of the code. 2 R. S. 1876, p. 183.

The complaint sets out the pleadings and issues in the action, the former trial, which was had at the April term of the Grant Circuit Court, 1878, and the evidence given by the parties on that trial. It is also alleged that after the adjournment of the April term, 1878, of said court, the appellant had discovered material new evidence; that he had been unable to discover it by the use of due diligence until after the term

Kitch v. Oatis

of the court at which the cause had been tried was adjourned. The newly discovered evidence is also set out in the complaint, and the affidavits of the several witnesses by whom he expected to prove the facts are attached to and made part of the complaint. It was alleged that the witnesses resided in Grant county, and that if a new trial should be granted their testimony could be procured.

The appellee answered this complaint by a denial. The issue was submitted to the court and a new trial refused.

There is no bill of exceptions in the record containing the evidence submitted by the parties to the court on the trial of the issue made on the complaint for a new trial.

There are various affidavits copied into the record, some tending to support the application for a new trial, and others opposing it. From the record we infer that the issue was tried by the court upon these affidavits, but they are not so made a part of the record as to be considered in this court. The proper rule of practice in cases like this is thus stated in the case of *Sanders v. Loy*, 45 Ind. 229:

“The application” for a new trial, “when made after judgment and at a subsequent term of the court, must, as we have seen, be regarded as an independent proceeding, and must set out the issues upon the former trial, and the evidence given on such trial, with the newly discovered evidence. An issue must be formed on the complaint, and the issue thus formed must be tried by the court. Upon such trial, the plaintiff should introduce in evidence the record of the former trial, prove what the evidence was upon such trial, the newly discovered evidence, and show that it had been discovered since the term when the case was formerly tried, and what diligence he had used to discover the evidence before the former trial. The defendant should in like manner introduce his evidence orally before the court. If the new trial is refused, the party appealing to this court should put into the record by a bill of exceptions all the evidence, documentary

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and oral, which was offered and considered by the court in the application for a new trial." *Allen v. Gillum*, 16 Ind. 234; *McKee v. McDonald*, 17 Ind. 518; *Freeman v. Bowman*, 25 Ind. 236.

There is nothing in this record for us to decide.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

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 No. 8591.

BOTTORFF v. SHELTON.

INSTRUCTIONS.—*Oral and in Writing.—Practice.*—An oral instruction can not be lawfully given when the court has been properly required by a party to give all the instructions in writing.

SAME.—*Malicious Prosecution.—Reading Statute an Oral Instruction.*—Upon trial of an action for the malicious prosecution of a criminal action, orally citing and then reading to the jury the statute, 2 R. S. 1876, p. 465, section 18, defining malicious prosecution, was an oral instruction, and the court's failure, when it had been required, to reduce it to writing as a part of its written instructions thereupon given, was error.

From the Clark Circuit Court.

M. C. Hester, for appellant.

D. C. Anthony, for appellee.

NIBLACK, J.—Action by Joseph Shelton against Columbus J. Bottorff for malicious prosecution.

The complaint charged the defendant with having maliciously, and without probable cause, filed an affidavit before a justice of the peace, imputing to the plaintiff, and others, the crime of an assault and battery with an intent to murder him, the defendant, and with afterward dismissing a prosecution

Bottorff v. Shelton.

based upon such affidavit, by reason of which the plaintiff was acquitted and discharged.

Answer in general denial. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

Error is assigned upon the overruling of the motion for a new trial.

At the proper time, the defendant requested the court to give all of its instructions to the jury in writing. After the argument was concluded the court gave several instructions in writing asked for by the plaintiff; also, several written instructions requested by the defendant.

In setting forth the subsequent proceedings, the bill of exceptions recites that "the court, also, on its own motion, first stated to the jury verbally, and not in writing, that the statute defining malicious prosecutions is as follows—and then read to the jury from 2 Revised Statutes of 1876, page 465, the eighteenth section of the act entitled 'An act defining misdemeanors and prescribing punishment therefor,' approved June 14th, 1852, as amended by the act amending said section, approved March 5th, 1859."

"The court then gave to the jury the following instructions in writing," which instructions are copied at length into the bill of exceptions.

The appellant insists that the verbal statement made to the jury by the court concerning the statute defining malicious prosecutions, as above set out, was in violation of his request that all the instructions given in the cause should be in writing, and that consequently the court erred in making such verbal statement.

This verbal statement, including the reading connected with it, constituted nothing more than an oral instruction. It had none of the peculiar attributes of an instruction in writing. It did not put what the court communicated to the jury upon paper in such a way as to afford the defendant all the opportunities for reserving an exception to which he was entitled. It left what was said by the court in a condition which would

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have required it to be afterward written down by some one in case either party had desired to bring it into the record.

It is well settled that an oral instruction can not be lawfully given when the court has been properly required to give all the instructions in writing. *Davis v. Foster*, 68 Ind. 238.

The motion for a new trial ought to have been sustained.

The judgment is reversed, with costs, and cause remanded for a new trial.

No. 8475.

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79	100
134	265
79	100
137	269
79	100
143	178
79	100
148	149
79	100
155	655

HIGHWAY.—*Board of Commissioners.*—*Jurisdiction.*—*Report of Viewers.*—An improper rejection of the report of reviewers appointed by a board of county commissioners in proceedings for the location of a highway does not deprive the board of jurisdiction of the matter.

SAME.—*Jurisdiction.*—Where an inferior tribunal has obtained jurisdiction over the parties in a matter or proceeding, of the subject-matter of which it, by law, has or may have jurisdiction, its proceedings thereafter, though irregular or erroneous, are not void.

SAME.—*Appeal.*—*Trial.*—*Practice.*—Upon appeal to the circuit court from the final decision of a board of commissioners, in proceedings for the location of a highway, the case must “be heard, tried and determined as an original cause,” and, on such hearing, the previous orders of the board and reports of viewers have no significance.

From the Vanderburgh Circuit Court.

C. A. DeBruler and *E. R. Hatfield*, for appellants.

J. B. Rucker and *H. A. Mattison*, for appellees.

WOODS, J.—Proceedings on the petition of the appellees for the location and opening of a highway. The viewers having reported in favor of the “public utility” of the proposed way, the appellants, with others, filed a remonstrance, alleging that the way would not be of “public utility,” and, also, filed claims for damages. Thereupon the board of commis-

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sioners appointed reviewers, "to review the proposed highway, report on utility, to assess damages, if any, and make written report to the board," etc.

At the next term of the board, the reviewers presented a report that the way would not be of public utility. This report the board rejected, because it was silent in reference to the damages claimed, and ordered the reviewers to report *instantly* the damages, if any, that would be sustained by the remonstrants; and thereupon appointed other viewers to view the proposed road, and report to the board at its next term as to the public utility of the road, "taking into consideration the damages that may be assessed by the above-mentioned reviewers." The said reviewers, in accordance with the order, made a report of the damages which would result to the respective remonstrants; and, at the next term of the board, the other viewers reported the road to be of "public utility and a great necessity to the county." Thereupon the board ordered the way established and opened, and directed the payment of the damages assessed out of the county treasury.

On appeal, the proceedings had in the circuit court, as stated in the appellants' brief, were as follows:

"Appellants first moved to remand the cause to the board of commissioners, with an order to the board to strike out all of their proceedings subsequent to the filing of the report of the reviewers declaring the highway of no public utility, and to enter an order accepting said report, and declaring said highway to be of no public utility. This was asked upon the ground that the proceedings of the board subsequent to the filing of the report of the reviewers were *coram non judice* and void. The motion was overruled and appellants excepted. Appellants then moved to dismiss the cause for the same reason, and, this motion being overruled, appellants excepted. Thereupon the case went to trial, and, after the verdict was returned, the appellants moved successively for judgment *non obstante*, for a new trial, and in arrest; but the motions were all overruled. The proper exceptions were reserved; and it

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may as well be stated, once for all, that all these motions are based upon the same idea, and were made for the purpose of testing one single question, viz., the validity of the acts of the commissioners subsequent to the report of the first reviewers, and the effect of those proceedings, if invalid and void."

We are not able to agree with counsel in the proposition, that the proceedings of the board subsequent to the filing of the report of the viewers was without jurisdiction. The report of the viewers might have been such as that it would have been proper for the board to reject it. Whether the board would accept the report in question, was for it to decide, and a wrong decision could not deprive it of the power to proceed in the pending matter until a final order or conclusion was reached. There are numerous recent decisions of this court upon the subject of jurisdiction, to the effect that once an inferior tribunal has obtained jurisdiction over the parties in a matter or proceeding, of the subject-matter of which it, by law, has or may have jurisdiction, its proceedings thereafter, though irregular or erroneous, are not void. *Stoddard v. Johnson*, 75 Ind. 20; *Featherston v. Small*, 77 Ind. 143. It may be observed, too, that the appellants, though presumably present, made no objection to the action of the board, and ought, therefore, to be deemed to have waived the right to object. But, if it were conceded that after the making of the report of the reviewers against the utility of the proposed way, the board had no power to do more than enter an order refusing to locate the way, it would avail the appellants nothing on this appeal.

Upon an appeal from a decision of the commissioners to the circuit court, by the express requirement of the law, the case is to "be heard, tried and determined as an original cause," 1 R. S. 1876, p. 357, section 36; and, on such hearing, the previous orders of the board and the reports of viewers have no significance. *Turley v. Oldham*, 68 Ind. 114; *Bowers v. Snyder*, 66 Ind. 340; *Scraper v. Pipes*, 59 Ind. 158.

If the circuit court had sustained the motion of the appellants to remand the case to the commissioners, with directions

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to enter judgment on the report of the reviewers, dismissing the petition or refusing to establish the road, the petitioners, within thirty days from the entry of that judgment, might have appealed to the circuit court, and so have compelled the hearing and trial which were had, and, presumably, with the same result.

The judgment of the circuit court is affirmed, with costs.

No. 7960.

GWIN v. MOORE ET AL.

PROMISSORY NOTE.—Endorser.—Diligence.—Insolvency.—Complaint.—In a complaint against the endorser of a promissory note, an allegation that the maker, at the time the note matured, was, and until the commencement of the action continued to be, totally insolvent, having no property subject to execution out of which their claim could be made—shows a sufficient excuse for plaintiff's delay in proceeding against the maker.

SAME.—Evidence.—Reasonable Diligence.—In such action, evidence that the note sued on was endorsed and delivered to the plaintiffs April 18th, 1875, and became due June 20th, 1876; that in an action commenced against the maker April 26th, 1877, judgment was recovered June 2d, 1877; execution issued November 7th, 1877, and return thereof made February 1st, 1878, that no property of any description could be found whereon to levy the same, shows an entire want of the reasonable diligence required to charge the defendant as an endorser.

SAME.—Insolvency of Maker.—Evidence.—Verdict.—In such case, evidence tending to show that the maker was actually insolvent, and that an action against him commenced within a reasonable time after the maturity of the note and prosecuted with diligence would have been unavailing, will sustain a verdict against the endorser.

From the Tippecanoe Superior Court.

R. C. Gregory, W. B. Gregory and W. Mote, for appellant.

A. A. Rice, for appellees.

MORRIS, C.—Samuel Moore, John O. Morgan and North

79	103
165	164

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Parker, the appellees, brought this suit against the appellant as the endorser of a promissory note.

The complaint states that on the 20th day of June, 1874, one William D. Kolb, by his note of that date, promised to pay to the order of the appellant, two years from date, the sum of one hundred dollars, with interest at ten per cent. per annum, payable annually, and with attorney fees; that the appellant assigned said note by blank endorsement to one George Marlott, who transferred the same by delivery to the appellees as collateral security for a debt which he then owed and still owes them; that a reasonable attorney's fee for collecting said note is twenty-five dollars; that the note is due and remains unpaid, except \$32 which had been paid and endorsed on the same.

It is also alleged that when the note became due the maker, Kolb, was, and ever since has been, and now is, notoriously, wholly and totally insolvent, having no property subject to execution, out of which their claim could be made.

It is also stated that the appellees received said note from said Marlott on the 18th day of April, 1875; that suit was commenced on said note by the appellees, as against the maker and the appellant, in the Fountain Circuit Court, for the May term thereof, 1877, that being, as alleged, the first term of said court held after the appellees received said note; that they recovered in said court a judgment on said note against Kolb for \$104 and costs, on the 2d day of June, 1877, and afterwards dismissed the suit against the appellant; that execution was afterwards duly issued on said judgment against said Kolb and duly returned by the sheriff of Fountain county, endorsed, "No property of any description whatever found whereon to levy." George Marlott was made a defendant to answer as to his interest in the suit, but the action was dismissed as to him. The appellant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled. He then answered by a general denial. The cause was submitted

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to a jury, who returned a verdict for the appellees. The appellant filed a motion for a new trial, which was also overruled. He then moved in arrest of judgment. This motion was overruled and judgment was rendered on the verdict for the appellees.

The rulings of the court upon the demurrer to the complaint, and the motions for a new trial, and in arrest of judgment, are assigned as errors.

We think the complaint was sufficient. The averment that Kolb, the maker, was, at the time the note matured, and continued to be until the commencement of the suit, totally insolvent, "having no property subject to execution, out of which their claim could be made," excused the delay in proceeding against the maker. Where the maker is insolvent at the time the note becomes due and so continues, having no property subject to execution, it is not necessary, in order to charge the endorser, to institute legal proceedings against him. *Kestner v. Spath*, 53 Ind. 288; *Roberts v. Masters*, 40 Ind. 461.

The appellant insists that the complaint is fatally defective, because it does not aver that the note is unpaid. In this counsel are mistaken. The complaint does aver that the note, except the sum of \$32 endorsed on it, is unpaid.

The motion in arrest of judgment is not discussed, and will not, for that reason, be considered.

It is insisted by counsel for the appellant, that the court below erred in overruling the motion for a new trial, because the verdict was not sustained by sufficient evidence.

The appellees read the note sued on and the appellant's endorsement thereon in evidence. They also read in evidence a transcript from the Fountain Circuit Court, from which it appeared that on the 26th day of April, 1877, the appellees commenced a suit in the Fountain Circuit Court on the note now in suit, against William D. Kolb, as maker, and the appellant as endorser; and that on the 2d day of June, 1877, they recovered in said court a judgment on said note against said Kolb for \$104 and costs, the suit being subsequently dis-

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missed as to the appellant; that on the 7th day of November, 1877, the appellees caused an execution to be duly issued on said judgment against said Kolb, and delivered to the sheriff of Fountain county, who, on the 1st day of February, 1878, returned the execution, stating in his return that no property of any description could be found whereon to levy the same.

The note sued on matured June 20th, 1876. The suit against the maker was not commenced for more than ten months after its maturity, and execution was not taken out until five months had elapsed from the rendition of the judgment. The facts show an entire want of that reasonable diligence which the law requires in order to charge the appellant as indorser of the note in suit. If the judgment below can be sustained, it is because the evidence in the case shows, or legally tends to show, that proceedings by suit against the maker, commenced within a reasonable time after the maturity of the note, and prosecuted with diligence, would have been unavailing.

We have examined the testimony and think that it tends to show that the maker of the note was, from the time of its maturity until the commencement of this suit, a householder, and entitled under the law to \$300 of property free from sale on execution, and that during that period he had not, aside from liens, that amount of property. He had forty acres of land, worth as he swears, \$13 per acre; it and another forty acres adjoining it, which he testifies to have been worth less, was encumbered by a mortgage of \$800, with interest thereon at eight per cent. from 1870. It is true, that he further testifies that one Payne had assumed and agreed to pay off this mortgage. In addition to the land he had personal property, household furniture, etc., worth \$100. The land, that is, the eighty acres, was, according to his testimony, worth less than the debt for which it was mortgaged. It is obvious, therefore, that the maker of the note, from the time of its maturity until the commencement of this suit, according to his testimony, had no property subject to execution, out of which

Cole v. Duke.

any part of said debt could have been made. The appellant introduced testimony tending to show that the land was worth more than \$20 per acre, but we can not weigh the evidence for the purpose of disturbing the verdict. We think there was no error in overruling the motion for a new trial.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 8807.

COLE v. DUKE.

INJUNCTION.—An application for an injunction will be denied when it appears that the act sought to be enjoined has already been committed.

79	107
161	55

From the Howard Circuit Court.

C. N. Pollard, for appellant.

J. W. Kern and *D. A. Wood*, for appellee.

BEST, C.—The appellant brought this suit against the appellee, as the clerk of the city of Kokomo, to enjoin him from issuing an order for the payment of an allowance made by the common council of said city.

The appellee appeared and filed an answer, in which he averred that the order was issued and paid before process was issued and before he had any notice of the proceeding.

The appellant replied that before the order was issued he had notified the appellee not to issue it; that proceedings would be instituted to enjoin the payment of the allowance; that the complaint was in fact filed before the order was issued, and that it was done with intent to evade the proceedings about to be instituted.

A demurrer for want of facts was sustained to this reply, and, the appellant declining to further plead, final judgment was rendered against him.

Stout v. Woods.

This ruling presents the only question in the record, and it was clearly right. The reply did not avoid the facts averred in the answer. It was averred that the act sought to be enjoined had already been committed. If so, it could not be corrected by an injunction, as its purpose is to prevent and not to correct wrongs. The reply averred no facts in avoidance of the answer, and, therefore, the demurrer was properly sustained.

The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is, in all things affirmed, at the appellant's costs.

79	108
128	515
129	518
79	108
1166	666

No. 7298.

STOUT v. WOODS.

BILL OF EXCEPTIONS.—*Supreme Court.*—*Evidence.*—*Practice.*—A bill of exceptions containing evidence must be definitely settled in the trial court. The Supreme Court can not undertake to determine from conflicting statements, which is the correct version of the testimony of witnesses.

SAME.—*Part of Evidence.*—*Point to Be Considered.*—Where a bill of exceptions does not contain the usual statement, "This was all the evidence given in the cause," but contains all relating to the point to be considered, the Supreme Court will examine the ruling admitting it.

JURISDICTION.—*Summons.*—*Collateral Attack.*—*Practice.*—A summons, containing the name and term of the court particularly designated, was sufficient to confer jurisdiction and to sustain a judgment against collateral attack, where the court had acquired jurisdiction of the subject-matter of the action, and the defendant had voluntarily acknowledged service of process.

SAME.—Where a court is required to, and does, determine a jurisdictional question, its decision can not be collaterally questioned.

SAME.—*Notice.*—Where there has been some notice, however defective, the court's decision that it was sufficient can not be collaterally impeached.

From the Wabash Circuit Court.

M. H. Kidd, for appellant.

ELLIOTT, C. J.—It is settled by many decisions, that, where a ruling upon a motion for a new trial can not be intelligently

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understood or justly reviewed without an examination of all the evidence, it must all be brought into the record by a bill of exceptions, framed and authenticated as the law requires, or the appeal will be unavailing. *Johnson v. Wiley*, 74 Ind. 233; *Wells v. Wells*, 71 Ind. 509. The evidence is not all in the record before us. The statement of the judge, written in the bill, reads thus: "The foregoing, with accompanying objections, is presented to me by plaintiff's counsel as a bill of exceptions. The objections taken and above recited are properly made, and to that extent state the facts. If the foregoing so put together forms a bill of exceptions, I hereby sign it as such." The usual statement that "it contains all the evidence given in the cause," is not found in the bill.

Parties must settle their bills of exceptions in the trial court. The appellate court can not undertake to determine what is and what is not a correct statement of the evidence. In the bill under examination the testimony of two witnesses is given very differently; the appellant giving one version of their testimony and the appellee giving another.

Many of the questions discussed can not be properly understood without an examination of the entire evidence, and, as all of the evidence is not in the record, we can give them no consideration.

There are cases where a ruling upon the admission of evidence may be fully understood without an examination of the entire evidence. In cases where the record fully and clearly shows the character of the evidence admitted and fully discloses all the facts and circumstances bearing upon the point to which the evidence is directed, the ruling admitting it may be properly examined. *Johnson v. Wiley*, *supra*. There is in the present case one question which the record does fully present; the presence of the entire evidence would not exhibit it more clearly, nor afford a more intelligent apprehension of its character. In order to fully understand this question it is necessary to make a brief reference to the facts of the case.

Appellant claimed the personal property which is the subject

Stout v. Woods.

of litigation by virtue of a writ of attachment issued against one Elias Bausman. Appellee claimed it under a decree foreclosing a chattel mortgage executed to him by Bausman at a date prior to the issuing of the appellant's attachment. On the trial the appellee offered in evidence the record of the action instituted by him for the foreclosure of the chattel mortgage. The record showed the issuing of summons and a proper acknowledgment of service by Bausman, the defendant in the action. Omitting all merely formal facts, the summons runs thus: "You are hereby commanded to summons Elias Bausman to appear in the circuit court of Wabash county before the judge thereof, on the — day of —, 1878, the — day of the — term, to be held in the court-house in Wabash on the fourth Monday of February, 1878." The position of appellant is, that, as the summons is blank as to the time at which Bausman was required to appear, it is so radically defective as to be insufficient to confer jurisdiction. This position is untenable. The circuit court had jurisdiction of the subject-matter of the action, and the defendant had voluntarily acknowledged service of process. The defect in the summons ought not, in such a case, to be allowed to overturn the judgment. The court was named and the term particularly designated. There was enough to confer jurisdiction and to sustain the judgment against a collateral attack.

The court was required to decide upon the sufficiency of the summons, and, as this was a decision upon a jurisdictional question, it is firmly settled that where a court is required to, and does, determine a jurisdictional question, its decision can not be collaterally questioned. There is a plain and well marked distinction between cases where there is some notice, however defective, and cases where there is no notice at all. Where there is some notice then, no matter how irregular it may be, and however much the court may have erred in deciding it to be sufficient, the judgment can not be collaterally impeached. *Muncey v. Joest*, 74 Ind. 409.

Judgment affirmed.

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No. 8845.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY
COMPANY v. HIXON.

NEGLIGENCE.—Railroad.—Injury by Fire from Locomotive.—Complaint.—A complaint against a railroad company for injury to property, consisting of growing grass and stacks of hay and straw, caused by coals and sparks from a locomotive setting fire to dry grass, weeds, rubbish and other combustibles negligently suffered to gather on the company's right of way, and communicated to plaintiff's land "by the medium" of such combustibles, is insufficient without an allegation that the fire was permitted to escape upon the plaintiff's land by the fault and negligence of the company. ELLIOTT, C. J., and WOODS, J., dissent.

SAME.—Answer.—Contributory Negligence.—It is not a sufficient answer to such complaint, even if amended by supplying such allegation, that the plaintiff was guilty of negligence contributing to the injury by permitting grass, weeds and rubbish to accumulate on his own land adjoining the company's right of way, by means of which the fires were communicated to his property.

SAME.—Practice.—Demurrer to Bad Answer Carried Back.—Complaint.—In such case, a demurrer to such bad answer should have been carried back and sustained to the complaint.

SAME.—Interrogatories.—General Verdict.—In such case, answers to interrogatories, showing that there was dry grass on the plaintiff's lands, which grass was burned by the fire, and in burning spread the fire over the land, are not inconsistent with a general verdict for the plaintiff, and show no defence to his action.

SAME.—Damages.—Opinion of Witness.—Evidence.—On trial of such action, it was error to permit a witness, over objection, to state, in answer to the question, "What was the damage per acre?" that "The damage was from three to four dollars per acre."

SAME.—Presumption.—Evidence.—Rebuttal.—On such trial, it was error to refuse to allow the company to rebut the presumption of negligence by proving that the locomotive engines of the company were provided with the best methods known for the prevention of fire, and that they were in good order and repair and skilfully managed, at the time complained of.

From the Lake Circuit Court.

N. O. Ross, for appellant.

E. Griffin and — Griffin, for appellee.

BICKNELL, C. C.—Sparks from the appellant's engines set fire to some dried grass, weeds and rubbish, on the appellant's

79	111
126	232
79	111
134	254

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land, appropriated for a right of way, and from said grass, etc., the fire reached the appellee's land adjoining said right of way, and there burned up and destroyed the growing grass and some stacks of hay and straw.

This suit was brought to recover damages for said burning.

The complaint was in two paragraphs. Demurrer to both paragraphs for want of facts sufficient, etc., were overruled. The appellant answered in three paragraphs. To the second of these paragraphs of answer the appellee's demurrer was sustained; to the third his demurrer was overruled. The appellee replied in denial of said third paragraph. The cause was tried by a jury upon the first and third paragraphs of the complaint, the general denial, the third paragraph of answer, and the reply thereto. The jury returned a verdict for the appellee for eighty dollars.

With their verdict the jury returned interrogatories and their answers to the same, as follows:

Interrogatories on behalf of the plaintiff:

"1st. Did the defendant allow grass, weeds, rubbish and other combustible material to accumulate on its right of way, opposite to where the defendant's (plaintiff's) grass was burned? Answer. Yes.

"2d. Did the fire start on defendant's right of way and run from thence upon the plaintiff's land? Answer. Yes.

"5th. Was plaintiff damaged by either of said fires, and if so, how much? Answer. Yes; by both of said fires, and damaged to the amount of eighty dollars.

"6th. Were said fires ignited and started by sparks or coals of fire from defendant's locomotive? Answer. Yes."

Interrogatories on behalf of defendant:

"1st. Was the land of the plaintiff covered with dry grass up to the right of way of the defendant's road? Answer. Yes.

"2d. Did the fire spread over the land of the plaintiff by means of the dry grass on his own land? Answer. Yes.

"3d. Do you find from the evidence that the fire escaped

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from a locomotive of the defendant and did the injury complained of? Answer. Yes.

"4th. Was it windy at the time the fire started? Answer. Yes.

"5th. Was the wind the cause of the fire spreading over the plaintiff's ground and doing the injury complained of? Answer. No."

The appellant's motion for judgment upon the answers to the interrogatories notwithstanding the general verdict was overruled.

The appellant's motion for a new trial was overruled and judgment was rendered upon the verdict.

The appellant assigns errors as follows:

1st. In overruling the demurrers to the complaint.

2d. In sustaining the demurrer to the second paragraph of the answer.

3d. In overruling the motion for a new trial.

4th. In overruling appellant's motion for judgment upon the answers to the interrogatories, notwithstanding the general verdict.

The first paragraph of the complaint states that the appellee's land adjoins the appellant's railroad; that it was sown with timothy seed, and was producing large and valuable crops of hay, and that coals were negligently dropped and sparks and fire emitted from the appellant's locomotive engines, which set fire to dry grass, weeds, rubbish and other combustibles by defendant negligently suffered to gather on the appellant's right of way; and that said fire, "by the medium" of said combustibles, was communicated to the plaintiff's land, and there burned his growing grass to his damage, etc.; that said fire and damage were not caused by any negligence on the part of the plaintiff, but were caused in part by a defect in the flue or smoke-stack and spark-arrester, and a defect in the ash-pan of defendant's engines. Wherefore, etc. The second paragraph of the complaint is the same

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as the first, except that it alleges the burning and destruction of thirty tons of timothy hay stacked on the appellee's land.

The objection made to both of these paragraphs is, that they contain no allegation that the fire was communicated to the appellee's property by any fault or negligence of the appellant; that, although they aver negligence as to the origin of the fire, and in permitting the accumulation of combustible matter on the appellant's right of way, yet they allege no negligence in that which was the proximate cause of the injury, to wit, permitting the fire to escape upon the plaintiff's land.

The complaint in this case is evidently copied from the complaint in *The Pittsburgh, etc., R. R. Co. v. Nelson*, 51 Ind. 150. That was an action for burning wood, which, with the consent of the railway company, had been placed on its right of way. The language of the complaint was: "Coals were negligently dropped and sparks emitted from the locomotive of appellant, which set on fire an accumulation of dry grass, weeds and rubbish, and other combustibles, suffered to gather beside the said track and on their right of way, and that said fire, through the medium of said dry grass, weeds, rubbish and other combustible materials, so gathered upon said right of way, as aforesaid, was communicated to the said wood of the said plaintiff," etc. The court held that complaint sufficient, citing *The Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471. But the difference between the two cases is, there, the plaintiff's wood was on the company's right of way; here, the fire was communicated from the right of way to the plaintiff's land adjoining. In this respect, the case at bar resembles the case of *The Pittsburgh, etc., R. W. Co. v. Culver*, 60 Ind. 469, which was an action for burning wood corded up near the line of the railway. There the same objection was made to the complaint as is here made, and NIBLACK, C. J., delivering the opinion of the court, said: "Negligence in starting the fire may be such in many cases as will tend to establish negligence in allowing it to communicate to the property of others, and to thus characterize the whole transaction as a negligent one; yet an averment that the

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fire was negligently started will not dispense with, or supply the place of, an allegation that the fire was negligently allowed to communicate to the property of other persons."

A man who negligently sets fire on his own land, and keeps it negligently, is liable to an action for any injury done by the spreading or communication of the fire, directly from his own land, to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated. *Higgins v. Dewey*, 107 Mass. 494. Following the case of *The Pittsburgh, etc., R. W. Co. v. Culver, supra*, the complaint in the case at bar must be held insufficient for want of an averment, that the fire was permitted to escape upon the plaintiff's land by the negligence of the appellant, notwithstanding the statement in the earlier case of *The Toledo, etc., R. W. Co. v. Wand*, 48 Ind. 476, that "If the appellant carelessly and negligently ignited inflammable substances on the railroad track, the natural tendency of which was to conduct the fire to the premises * * adjacent thereto, the fact would tend to establish the case against the appellant."

The court erred in overruling the demurrer to the complaint.

The second paragraph of the answer, to which a demurrer was sustained, asserts that the appellee was guilty of negligence contributing to the injuries complained of, by permitting grass, weeds, and rubbish to accumulate on his own land adjoining the appellant's right of way, by means of which the fires were communicated, etc.

If, by appellant's negligence in starting the fire and in permitting it to escape upon plaintiff's land, a cause of action had accrued, it would have been no defence thereto that the appellant had on his land something that fire would burn; but as a bad answer is good enough for a bad complaint, and a demurrer searches the record, the demurrer to the second paragraph of the answer ought to have been sustained to the complaint. *Ætna Ins. Co. v. Baker*, 71 Ind. 102.

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Hixon.

As to the fourth error assigned, the appellant claims that, under the answers of the jury to his first and second interrogatories, the company was entitled to judgment, notwithstanding the verdict. These answers merely showed that there was dry grass on the appellee's land, which grass was burned by the fire, and in burning spread the fire over the land. There was nothing in these answers inconsistent with the general verdict or showing a defence to the action. There was no error in the ruling of the court upon the appellant's motion for judgment.

As to the third error assigned, to wit, overruling the motion for a new trial, several causes for a new trial were alleged, among them the following: The appellee and another witness were permitted to state, over the objection of the appellant, in answer to the question, "What was the damage per acre?" that "The damage was from three to four dollars per acre." This was error. *The Ohio, etc., R. W. Co. v. Nickless*, 71 Ind. 271; *Bissell v. Wert*, 35 Ind. 54; *City of Logansport v. McMillen*, 49 Ind. 493; *The Baltimore, etc., R. W. Co. v. Johnson*, 59 Ind. 247.

The appellant proposed to prove by John Donaldson "that the locomotive engines of the appellant were provided with the best methods known for the prevention of fire, and that they were in good order and repair and skilfully managed at the time complained of." Part of the negligence charged was permitting sparks of fire to escape.

In the case of *The Indianapolis, etc., R. R. Co. v. Paramore*, 31 Ind. 143, it was intimated that negligence ought not to be inferred *prima facie*, from the mere fact that sparks of fire escaped from the engine and burned adjacent property. ELLIOTT, C. J., on p. 147. But the later and better opinion is, that the burning of adjacent property, by sparks from a locomotive engine, is *prima facie* evidence of negligence in the company and their servants having the management of the engine, rendering it incumbent on them to show that proper precaution had been taken to prevent the escape of sparks.

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Addison Torts, 242. See also the authorities cited in *Gagg v. Vetter*, 41 Ind. 228. It is analogous to the case of an injury sustained by a passenger on a train, which has always been regarded as *prima facie* evidence of negligence in the company. *The Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462; *The Jeffersonville R. R. Co. v. Hendricks' Adm'r*, 26 Ind. 228.

The testimony of Donaldson had a tendency to rebut such *prima facie* evidence of negligence. *The Pittsburgh, etc., R. R. Co. v. Nelson*, 51 Ind. 150, on p. 154, citing *Gagg v. Vetter*, *supra*; *Toledo, etc., R. W. Co. v. Wand*, *supra*; *Grand Rapids, etc., R. R. Co. v. Boyd*, 65 Ind. 526.

The court therefore erred in excluding said testimony.

The foregoing conclusions render it unnecessary to consider the remaining causes for a new trial, which relate to the sufficiency of the evidence and the validity of the instructions given and refused.

The judgment of the court below ought to be reversed and the cause remanded for a new trial.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial, with instructions to permit the appellee to amend his complaint.

ELLIOTT, C. J., and WOODS, J., dissent from so much of the foregoing opinion as holds that the complaint was insufficient.

No. 8641.

DURHAM ET AL. v. CRAIG.

PRINCIPAL AND SURETY.—*Mortgage.—Subrogation.*—A mortgage by the principal debtor to the surety, with condition that the mortgagor shall pay the debt, and that the surety shall be indemnified, is in equity available to the creditor, and he may resort to the mortgaged property for the satisfaction of his debt.

79	117
125	439
79	117
144	418
145	604
79	117
168	552

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SAME.—Merger.—Satisfaction.—The subsequent purchase, by the surety, of the property mortgaged, does not merge the mortgage as against the creditor, nor can the surety enter satisfaction of it.

SAME.—Notice.—If such mortgage be duly recorded, the record charges all subsequent purchasers and mortgagees of the property with notice of the rights of the creditor.

SAME.—Principal and Agent.—Trust and Trustee.—Where an agent, making a loan of money for his principal, takes a mortgage to secure the loan in his own name, instead of the name of the principal, he is in equity regarded as holding the mortgage in trust for the principal.

NOTICE.—Equity.—One who, with notice of an equity, purchases the estate of one who has no notice, ordinarily takes the estate discharged from the equity; but if, having notice, he first sells the estate and then buys it back, the case is an exception to the rule.

SUPREME COURT.—Assignment of Error.—Practice.—Where a complaint is good against one of several defendants thereto, a joint assignment of error by all, which questions its sufficiency, is not available as to any of them.

SAME.—An assignment of error that the court erred in rendering the judgment, is too general to raise any question in the Supreme Court.

From the Montgomery Circuit Court.

P. S. Kennedy and *W. T. Brush*, for appellants.

G. W. Paul and *J. E. Humphries*, for appellee.

FRANKLIN, C.—This is an action by Ruth Craig (appellee), upon a note executed by Joseph T. Hanna, James Green and Thomas F. Craig, and for the foreclosure of a mortgage executed by said Hanna and Green, including others claiming an interest in the mortgaged premises, all of whom are appellants. All of the complaint was withdrawn except the fifth paragraph. Appellants were all defaulted except Durham. He filed an answer in two paragraphs, the second being a denial. A demurrer was sustained to the first paragraph of his answer, he refused to amend or answer over, and elected to stand upon the demurrer, and withdrew his denial. An exception was reserved to the sustaining of the demurrer, and judgment was rendered for the appellee.

Appellants have all jointly assigned in this court, as error, that the complaint does not state facts sufficient to constitute a cause of action.

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There can be no question as to the complaint being a sufficient cause of action, on the note, against the makers, and also to foreclose the mortgage as against Craig. This assignment is therefore unavailable as to any of the appellants.

Durham then makes a special similar assignment of error as to him.

This requires a more specific examination of the complaint. It avers, in substance, that, on the 26th day of June, 1871, said Hanna and Green were partners in the business of keeping a livery, feed and sale stable in Crawfordsville, Indiana, and owned seventh-twelfths of the real estate upon which the stable was situated; that they then made arrangements with said appellee to borrow of her the sum of \$1,000; that to consummate the same she directed her agent, Thomas F. Craig, to let them have the money, take their note and a mortgage on the livery-stable property to secure its payment; that the money was to be used by the partners in the livery-stable business; the agent let them have the money, took their note and mortgage, signed the note himself as surety, delivered the note to appellee, and informed her that he had taken the mortgage. She, for some time, supposed that the mortgage was also executed to her, but upon learning that it was executed to said Craig, her agent, at her request, Craig assigned, by delivery, the mortgage to her. The mortgage was duly recorded the 27th day of June, 1871; that it still remains unsatisfied, and the money unpaid; that on the 30th day of January, 1872, said Craig, having a full knowledge of all the facts, and without the knowledge or consent of appellee, purchased said Green's interest in said property and livery-stable business, etc., and agreed, in writing, to pay off half of the indebtedness of said partnership, including said appellee's debt; that, on the 12th day of August, 1873, said Craig, with a full knowledge of all the facts, and without the knowledge or consent of appellee, purchased said Hanna's interest in said property, livery-stable business, etc., and agreed, in writing, to pay off all the indebtedness of both of said partnership firms, in-

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cluding said appellee's debt; that he had paid all of said indebtedness except the said debt coming to appellee; that on the 5th day of September, 1877, said Craig, in violation of appellee's rights in said real estate, executed to the defendant William H. Durham a mortgage to secure a debt that was due from said Craig to said Durham, evidenced by a note made by said Craig more than one year prior to the making of said last named mortgage, and that said Craig received no new consideration whatever for making said mortgage, and said Durham gave no new consideration for the making of said mortgage; that the same was a voluntary act on the part of Craig to secure a pre-existing debt; that said Durham had notice of all of said facts, and is claiming that his mortgage is valid as against appellee; that her lien is prior and superior to said Durham's, and that she has a right to resort to the vendor's lien held by Hanna & Green for their indemnity for the payment of her debt, and that the same is superior and senior to the mortgage of said Durham. Copies of the various instruments referred to are filed as exhibits to the complaint.

The mortgage sought to be foreclosed by appellee contains the following clauses:

"The condition of the above mortgage is, that whereas the said Thomas F. Craig has become surety on a certain note, of even date herewith, of Hanna & Green for the sum of \$1,000, due one day after date, with ten per cent. interest from date, payable to Mrs. Ruth Craig. Now, if the said Hanna & Green faithfully and punctually pay said note, then this mortgage shall be null and void, otherwise to remain in full force. And whenever said Craig shall become liable for said note aforesaid, he may proceed to foreclose said mortgage, with a reasonable fee for plaintiff's attorneys, without relief from valuation or appraisement laws."

As to this mortgage, appellant's counsel claim that Craig, the mortgagee, by purchasing the mortgaged premises and assuming the payment of the mortgage debt, extinguished the

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mortgage; that it merged into the higher title, the deed; and a number of authorities are cited in support thereof. This might be true, if the mortgage is to be regarded as simply an indemnifying mortgage to the surety, and that Durham is an innocent purchaser for value without notice of appellee's equities. But we think this mortgage has a two-fold obligation; before it can become null and void, the note must be paid as well as the surety indemnified.

Where property is mortgaged to a surety, and the condition of the mortgage is that the mortgagor will pay the note which the surety has signed and indemnify the surety, the mortgage and mortgaged property are held in trust for the creditor and for the payment of the debt, and the creditor has a right in equity to have the property applied to the payment of the debt. *Gunel v. Cue*, 72 Ind. 34; *Rittenhouse v. Kemp*, 37 Ind. 258-262; 1 Jones Mortgages, secs. 386, 387; Story Equity, sec. 499e; *Constant v. Matteson*, 22 Ill. 546-556; *Roberts v. Richards*, 36 Ill. 339-342; *Jacques v. Fackney*, 64 Ill. 87; *City Nat. Bank, etc., v. Dudgeon*, 65 Ill. 11; *Vail v. Foster*, 4 N. Y. 312-314; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Curtis v. Tyler*, 9 Paige, 431; *Green v. Dodge*, 6 Ohio, 80; *Eastman v. Foster*, 8 Met. 19, 23 and 27; *Butler v. Ladue*, 12 Mich. 173; *Van Orden v. Durham*, 35 Cal. 136-145; *New-London Bank v. Lee*, 11 Conn. 112; *Wright v. Morley*, 11 Vesey, 12; *Seibert v. True*, 8 Kan. 52-65; *Rice v. Dewey*, 13 Gray, 47-49; *Wright v. Austin*, 56 Barb. 13-18; *Pierce v. Robinson*, 13 Cal. 116-122; *Saylors v. Saylors*, 3 Heisk. Tenn. 525, 531; *Price v. Trusdell*, 28 N. J. Eq. 200-204; *Watson v. Rose's Ex'rs*, 51 Ala. 292-298; *Saffold v. Wade's Ex'r*, 51 Ala. 214; *Crosby v. Crafts*, 5 Hun, 327; *New Bedford Institution, etc., v. Fairhaven Bank*, 9 Allen, 175-178; *Heid v. Vreeland*, 30 N. J. Eq. 591; *Farmers Bank v. Teeters*, 31 Ohio St. 36; *Varney v. Hawes*, 68 Me. 442.

Where a mortgage is made to a surety, containing an obligation to pay the debt as well as indemnify the surety, it enures to the benefit of the creditor as well as the surety, that

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after acceptance by the creditor the surety can not satisfy it, release it or otherwise dispose of it, without the consent of the creditor, and when duly recorded the record is notice of its contents to a purchaser. *McMullen v. Neal*, 60 Ala. 552; *Boyd v. Parker & Co.*, 43 Md. 182; *McCracken v. German Fire Ins. Co.*, 43 Md. 471; *Osborn v. Noble*, 46 Miss. 449; *Ross v. Wilson*, 7 Sm. & M. 753; *Phillips v. Thompson*, 2 Johns. Ch. 418; *Brandt Suretyship*, secs. 283 and 384.

There is a distinction made between such a mortgage and one containing no promise or obligation to pay the debt, but only to indemnify the surety.

When a mortgagor sells the mortgaged premises, and the purchaser assumes the payment of the mortgage debt as a part of the consideration money, the land is in his hands a primary fund for the payment of the debt, and the vendee in equity, as between him and his vendors, becomes the principal debtor for the mortgage debt, and either the creditor or the vendor has the right to have the land applied to the payment of the mortgage debt, in preference to a creditor of the vendee. Appellant is a creditor of the vendee, Thomas F. Craig. *Joselyn v. Edwards*, 57 Ind. 212; *Hoffman v. Risk*, 58 Ind. 113; *Scarry v. Eldridge*, 63 Ind. 44; *Russell v. Pistor*, 7 N. Y. 171; *Crowell v. Hospital of Saint Barnabas*, 27 N. J. Eq. 650-655; *Snyder v. Summers*, 1 Lea, Tenn. 534-539; *Trent v. Kyle*, 1 Heisk. 663; *Ledos v. Kupfrian*, 28 N. J. Eq. 161-164; *Manwaring v. Powell*, 40 Mich. 371; *Richardson v. Hockenhill*, 85 Ill. 124; *Meyer v. Lathrop*, 17 Hun, 66; *Calvo v. Davies*, 73 N. Y. 211-215; *Comstock v. Drohan*, 71 N. Y. 9; *Miller v. Thompson*, 34 Mich. 10; *Vrooman v. Turner*, 69 N. Y. 280; *Crawford v. Edwards*, 33 Mich. 354; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Reid v. Sycks*, 27 Ohio State, 285; *Johnson v. Zink*, 51 N. Y. 333; *Abell v. Coons*, 7 Cal. 105; *Cornell v. Prescott*, 2 Barb. 16; *Jones v. Parks*, 78 Ind. 537.

The appellee's debt against Hanna and Green, being a partnership debt, was intended to be secured by the mortgage upon

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the partnership property, and was an equitable lien on the firm property. A sale of their interests separately, one at a time, in said property, to Thomas F. Craig, and he assuming to pay the partnership debts, including appellee's claim, and the amount thereof being deducted from the purchase price of the property, did not divest appellee of her equities. The debt thus assumed continued a lien and trust upon said property in the hands of said Craig. And the property thus specifically charged with the payment of said debt, upon the application of appellee, may be sold for its payment. Parsons on Partnership, 3d ed., side p. 372; *Menagh v. Whitwell*, 11 Am. Rep. 683; *Morse v. Gleason*, 64 N. Y. 204; *Seaman v. Huffaker*, 21 Kan. 254; *Conroy v. Woods*, 13 Cal. 626; *Phillips v. Thompson*, 7 Am. Dec. 535.

A mortgage taken by an agent in his own name instead of the name of the principal, to secure a debt of the principal, is held by the agent in trust for the principal; and the principal may foreclose the mortgage and subject the property to the payment of the debt. *Rood v. Winslow*, Walk. Mich. 340; *Rood v. Winslow*, 2 Doug. Mich. 68; *Rogan v. Walker*, 1 Wis. 527; *The Wisconsin Bank v. Morley*, 19 Wis. 62; *Whiting v. Gould*, 2 Wis. 552; *Roller v. Spilmore*, 13 Wis. 26.

We think the complaint states sufficient facts to establish appellee's equities, in asking that the mortgage be foreclosed for her benefit, and that it constitutes a good cause of action against appellant Durham.

The third alleged error complained of is the sustaining of the demurrer to the first paragraph of appellant Durham's answer.

The substance of this paragraph of the answer is, that said Thomas F. Craig, on the 5th day of September, 1877, executed a mortgage to him upon the same premises named in the complaint, to secure the payment of one promissory note for \$990 (the mortgage shows the note was dated September 3d, 1876, and due one day after date); that he assigned the note and mortgage to his co-defendant, Peter C. Somerville; that

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the mortgage was foreclosed by said Somerville at the April term, 1879, of the Montgomery Circuit Court; that, at a sheriff's sale upon said decree of foreclosure, he purchased said property for the sum of \$500, and then held the sheriff's certificate for a deed to the same. It then avers the sale and conveyance of Hanna and Green's interest in the mortgaged property to said Craig, as set forth in the complaint, and that Craig assumed the payment of the debt to appellee; that Craig agreed to cancel and extinguish the mortgage sued on by appellee; that, at the time Craig assumed to pay said appellee's debt, the payors thereof were solvent and able to pay; that, at the time he received his mortgage from Craig, Craig represented that the mortgaged property was unincumbered, and that appellee gave no notice to the parties to the mortgage that she claimed any interest in the same, as she is now attempting to foreclose; and that his claim is paramount to all other liens and claims, especially that of appellee. The answer contains no denial of appellant's knowledge of appellee's equities in the premises.

There is a discrepancy in the description of the property as set forth in the two mortgages. In appellant's mortgage the description commences at a point on the north end of the lot, ten feet west of the point where the description commences in appellee's mortgage, and ends at the same place, the directions and distances being the same. This makes appellant's mortgage include a strip ten feet wide, north and south, upon the west side, which is not included in appellee's mortgage, and leaves out a similar strip upon the east side, which is included in appellee's mortgage.

This paragraph professes to answer the whole complaint, and in this particular it fails to do so. This discrepancy may have originated from some clerical error, but, if so, we can not tell in which mortgage it occurs.

Under this paragraph of answer appellant's counsel claim that although appellant took his mortgage to secure a pre-existing debt, without any new consideration whatever being

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paid, he is nevertheless to be held as an innocent purchaser for value, and is protected against existing secret equities. And in support thereof we are referred to the cases in this court of *Work v. Brayton*, 5 Ind. 396, and *Babcock v. Jordan*, 24 Ind. 14.

The rule of decision by this court upon this question, since the time of said decisions, has been changed, and now is the other way, that the giving of a mortgage to secure the payment of a pre-existing debt, without any new consideration, does not make the mortgagee a purchaser for value, so as to protect him against existing secret equities. *Busenbarke v. Ramey*, 53 Ind. 499; *Gilchrist v. Gough*, 63 Ind. 576-584; *Davis v. Newcomb*, 72 Ind. 413. See the cases therein cited. The rule in these latter cases has since been followed by this court.

But in this paragraph there is no averment that appellant, at the time he took his mortgage, had no notice of appellee's equities. There is an allegation that she gave no notice of her claim to the parties to her original mortgage, but appellant was not a party to that mortgage, and was not included in that allegation; and as the complaint charged him with notice, and the record of the mortgage was notice of its contents, under the averments of the answer, he can not be regarded as an innocent purchaser by the taking of his mortgage.

Appellant's counsel further urge that, if he was not an innocent purchaser for value in the taking of his mortgage, he afterwards transferred the note and mortgage to Peter C. Somerville, who was an innocent purchaser for value, and as he had bought the property upon Somerville's decree of the foreclosure of the mortgage, and had purchased the residue of the judgment over the amount of the sale, he then became an innocent purchaser for value, by being entitled to the benefits of Somerville's innocence. There is a rule of law, that one with notice purchasing from another without notice is protected by the innocence of his vendor. But this is an exception to that rule, and is governed by another rule, and

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that is, if one having notice sells to another without notice, and then buys back the same property, he loses the benefit of the innocence of the other, and his original notice re-attaches.

We think this paragraph of the answer was insufficient, and there was no error in sustaining the demurrer to it.

The last alleged error complained of is, that the court erred in rendering the decree in favor of the appellee, Ruth Craig.

No special objections have been pointed out to the decree, except that part in relation to the surplus, if any, being paid over to appellant Durham, and he certainly ought not to complain of this. No motion was made in the court below to change or modify the decree; no objections or exceptions were taken to its form or substance. And the assignment of error is too general and indefinite to present any question for decision.

We find no error in this record.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is in all things, affirmed, with costs.

79	126
126	285
79	126
126	479

 No. 8487.

ARNOLD v. STEPHENSON.

STATUTE OF FRAUDS.—Parol Contract.—Part Performance.—The surrender and acceptance of the possession of land, under and pursuant to a parol contract, constitute such part performance thereof as will take the case out of the statute of frauds.

SAME.—Payment of Purchase-Money.—Payment of purchase-money for land will not take a parol contract out of the statute.

SAME.—Sheriff's Sale and Deed.—Title.—Vendor and Purchaser.—Where the purchaser of land under a parol contract has acquired a perfect title by sheriff's sale and deed and has full possession, the vendor may recover the stipulated price.

From the Washington Circuit Court.

Arnold v. Stephenson.

H. Heffren, S. B. Voyles, J. A. Zaring and H. Morris, for appellant.

ELLIOTT, C. J.—The court below sustained a demurrer to the appellant's complaint, and judgment was entered against him, from which he prosecutes this appeal.

The complaint alleges that Lewis M. Edwards recovered judgment against appellant and two others; that execution was issued and levied upon real estate of the appellant; that the property was sold on the 26th day of May, 1877; that prior to that date appellant contracted with the appellee for the purchase of the land; that the appellee agreed to buy at the sheriff's sale, to pay off a mortgage to one John Arnold, to pay a note executed by appellant to Peter Cauble, to cancel and deliver up to appellant certain notes executed by him, and to pay the remainder of the stipulated price of \$6,000 to the appellant; that, pursuant to the terms of this contract, Stephenson bought the lands at the sheriff's sale for the sum of \$10; that in performance of his agreement appellee paid \$500 upon the note held by Cauble. It is further alleged that the appellee sold and assigned the certificate to one Lewis M. Edwards, who received a deed from the sheriff and is now in possession under it, and that appellant had no knowledge of the assignment of the certificate until after he had tendered a deed to the appellee. It is also alleged that the appellant tendered to appellee a warranty deed, and that he tendered and surrendered possession of the land. It is charged that "the plaintiff, relying upon the promises, agreements and contracts so made by said defendant with this plaintiff, and expecting him to carry out the same, and having no notice from defendant that he refused so to do, the time for the redemption for his land expired, and said land is entirely lost to this plaintiff." The complaint avers that the land was worth \$10,000, properly assigns breaches of the contract and prays judgment for damages resulting from the breach.

Where possession of land is surrendered and accepted un-

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der and pursuant to the terms of a verbal contract, it is such part performance as will take the case out of the statute of frauds. *Rucker v. Steelman*, 73 Ind. 396. To have this effect, the possession must be yielded by one party and accepted by the other as done in performance of the contract. The allegations of appellant's complaint do not bring the case within this rule, for they do not show that possession was taken under the contract.

The payment of purchase-money will not take a case out of the statute. *Johnston v. Glancy*, 4 Blackf. 94 (28 Am. Dec. 45); *Rucker v. Steelman*, *supra*. The part payment of the note to Cauble can not, therefore, be deemed sufficient to defeat the operation of the statute of frauds.

The present case is unlike that of *Rucker v. Steelman*, for there the verbal agreement was not made until after a deed had been executed by the sheriff and the title had vested in the purchaser. The verbal contract relied upon in that case was for the purchase of land owned by the person who bought at the sheriff's sale. The resemblance between this case and that of *Tinkler v. Swaynie*, 71 Ind. 562, is very close. In principle they are the same. We think that in cases of the class to which the one under consideration and that cited belong it should be held that, where the purchaser receives a sheriff's deed, and acquires full title and complete possession of the land, he can not escape liability upon the ground that the statute of frauds prohibits the enforcement of verbal contracts for the sale of an interest in land. We accordingly hold that, where the agreement is so far performed that the purchaser acquires a perfect title and full possession of the property, the vendor may recover the stipulated price. This is in accordance with the rule stated by Mr. Browne: "When so much of a contract as would bring it within the Statute of Frauds has been executed, all the remaining stipulations become valid and enforceable, and the parties to the contract regain all the rights of action they would have had at common law." Browne Statute of Frauds, sec. 117. This rule secures justice. Appel-

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lee obtained a title by the sheriff's sale, and the most rigid adherence to the requirements of the statute could have given him nothing more. The execution of the contract is really none the less complete because the land passes by the sheriff's deed instead of by the conveyance of the appellant. *Schenck v. Sithoff*, 75 Ind. 485. Appellee has secured all he bargained for, and he ought to pay what he promised.

It has often been decided that, where a contract has been performed by the conveyance of the property bargained for, the seller may maintain an action upon an implied promise to pay the value of the property. Implied promises of this character are not within the statute. *Browne Statute of Frauds*, 4th ed., sec. 124, authorities in note. This doctrine has received the sanction of this court. *Fisher v. Wilson*, 18 Ind. 133.

It is now well settled law, that the statute of frauds can not be made the means of perpetrating a fraud. The complaint states a case within this rule. The appellant parted with a substantial interest in property upon the faith of the appellee's promises and representations; the latter has received all the consideration he asked, or expected, for his promise. The statute ought not to be allowed to enable him to secure the benefit without yielding the agreed consideration.

Judgment reversed.

79	129
126	57

 No. 7881.

LOCKWOOD ET AL. v. HARDING ET AL.

CHATTEL MORTGAGE.—*When Void Upon its Face.—Fraudulent Intent Question of Fact.*—A mortgage of chattels made with intent to hinder, delay or defraud creditors, is void as to such creditors; but, as the question of fraudulent intent is made by statute in this State (section 4924, R. S. 1881) in all cases a question of fact, the cases will be rare indeed in which it can be said, as matter of law, that a chattel mortgage is void upon its face.

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SAME.—Action to Set Aside Mortgage.—Sufficiency of Complaint.—In an action by the creditors of the mortgagor of chattels to set aside the mortgage as fraudulent against them, if the complaint contains no allegations of facts impeaching the good faith of the parties to the mortgage, or the validity of the debts thereby secured, or the good faith and integrity of the parties in their dealings with the mortgaged property, such complaint is bad on a demurrer thereto, for the want of sufficient facts.

From the Parke Circuit Court.

S. D. Puett, J. B. Dowd and D. H. Maxwell, for appellants.
T. N. Rice and J. T. Johnston, for appellees.

Howk, J.—In this case, the question for the decision of this court, as it was for the circuit court, is this: Does the complaint of the appellants, the plaintiffs below, state facts sufficient to constitute a cause of action?

In their complaint the appellants, nineteen in number, alleged in substance, that, in October, 1878, by the consideration of the said Parke Circuit Court, they had severally obtained divers judgments against the appellee William H. Harding, for divers sums of money, setting out the dates and amounts of their respective judgments; that on the 22d day of November, 1878, all of said judgment plaintiffs caused executions to be issued on their respective judgments; that, on the same day, the said executions came to the hands of the sheriff of Parke county, and were by him, on the 21st day of December, 1878, levied on a stock of goods, notions, etc., of the appellee Harding, situated on the west half of lot 38, in the town of Rockville, being the same goods, etc., described in the mortgage thereafter mentioned; that, prior to the rendition of the appellants' said judgment against the said Harding, to wit, on the 13th day of September, 1878, he executed a chattel mortgage of his said stock of goods, notions, fire-proof safe and office and store furniture, described therein, to his co-appellee, Greenbury Ward, of said county, and to the firm of Kayne, Spring & Dale, of the city of New York, to secure the payment, on the first day of February, 1879, of a debt of \$3,150 to said Ward, and of \$1,055 to said Kayne,

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Spring & Dale, and caused said mortgage to be recorded, on the same day, in the recorder's office of said county, which said mortgage was made part of said complaint and set out, at length therein.

And the appellants further said, that their respective claims, on which their said judgments were obtained and executions issued as aforesaid, were in existence long before the execution of said mortgage, and that the appellee Harding, at the date of the execution of said mortgage, was largely indebted to other persons, of whom some had obtained judgments, and some had not; that after the issuing of execution on the appellants' said judgments, to wit, on the 25th day of November, 1878, the appellee Ward and said Kayne, Spring & Dale took possession of said stock of goods, etc., named in said mortgage and closed said store; that, for many years previous to the execution of said mortgage, the appellee Harding had been engaged in the business of a retail merchant of dry goods, notions, etc., and dealing in wool in said town; that, by the terms of said mortgage, the appellee Harding was permitted to retain possession of said goods, etc., until the 1st day of February, 1879, *except* in the event of the goods, etc., being levied on by any writ or execution, or coming into the hands of any assignee, administrator, etc., or the failure of the appellee Harding to attend strictly to the sale of the goods and use due diligence in the sale thereof, or to account truly for the proceeds of such sales, then and in that event the mortgagees might take immediate possession of said goods and personal property.

And the appellants further said, that on the — day of January, and long before their debts, by the terms of said mortgage, became due and payable, the appellee Ward, and said Kayne, Spring & Dale, put up said stock of goods, etc., at public auction in bulk, and bid in the same for \$——, and thereupon the said Kayne, Spring & Dale transferred and sold their interest in said stock to the appellee Ward, who opened up said store and placed the appellee Harding in the same;

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that, in and by said mortgage, the mortgagees agreed that said Harding might dispose of said goods, etc., at the regular retail price thereof, as his own property, and that, with the mortgagees' consent, he might use a portion of the proceeds of sales to replenish said stock of goods from time to time, as the necessities of the trade might require, the goods so purchased and the proceeds to be the property of the mortgagees; and that they thereby permitted the said Harding to carry on trade on said mortgaged stock of goods in the usual way and course of business; that the said Harding, with the knowledge of said Ward and without objection by him, did use a portion of the proceeds of the sales of said goods for the purpose of replenishing, and did replenish, said stock from time to time.

And the appellants further said, that, in and by said mortgage, the mortgagees agreed that said Harding might use a portion of the sales of said goods in payment of rents of the store-room and the necessary expenses of running and conducting the store; that the said mortgage did not fix the time for accounting, nor the terms and conditions of accounting, by the said Harding to the mortgagees, for the proceeds of the sales of said goods, prior to the 1st day of February, 1879; and that, at the date of said mortgage, the said Harding had not, nor had he at the commencement of this suit, sufficient other property out of which the appellants could make their said debts. Wherefore the appellants said that the execution of said mortgage tended to hinder and delay them in the collection of their debts, and, as to them, was fraudulent and void; and therefore they prayed that said mortgage might be set aside as to them, and the goods therein described, amounting in value to \$2,000, might be subjected to the payment of their said judgments, and for \$1,000 damages, and for other proper relief.

We are of the opinion that the court committed no error in sustaining the appellees' demurrer, for the want of sufficient facts, to the appellants' complaint. It is manifest, that, in drafting the complaint, the appellants' learned counsel pro-

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ceeded upon the theory that the chattel mortgage, by reason of its conditions and stipulations, was absolutely void on its face, without reference to any extrinsic facts. It seems to us, however, that this theory of the law can not be maintained in all cases, and certainly not in the case now before us. In this State, it is provided in section 21 of the act of June 9th, 1852, for the prevention of frauds, etc., and declaring certain conveyances, assignments, contracts and mortgages void, that "The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact." 1 R. S. 1876, p. 506; Rev. Stat. 1881, section 4924. In *Herman on Chattel Mortgages*, section 101, it is said: "When a mortgage of personal property contains a provision, securing to the mortgagor the right of possession and selling or disposing of the property, without being obliged to apply the proceeds to the payment of the mortgage debt, or any other creditor, it is void upon its face." There are some cases in this court, in which it would seem that this doctrine was recognized and approved. *The New Albany Ins. Co. v. Wilcoxson*, 21 Ind. 355; *Mobley v. Letts*, 61 Ind. 11; *Davenport v. Foulke*, 68 Ind. 382.

It seems to us that this question is hardly presented by the record in the case now before us; but we may say, without impropriety, that, in view of the statutory provision above quoted, the cases will be rare indeed, in which it can be correctly said that a chattel mortgage, without regard to extrinsic facts, is void on its face. On this point, see the recent case of *McLaughlin v. Ward*, 77 Ind. 383.

It will be seen from our summary of the appellants' complaint, in the case at bar, that the chattel mortgage therein mentioned covered other personal property besides the stock of goods and notions, to wit, a fire-proof safe, and office and store furniture. As to this other personal property, it is not claimed that the chattel mortgage secured to the mortgagor the right to sell or dispose of such property. It is clear, therefore, that the chattel mortgage was in any event a valid and

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binding lien upon the safe, and the office and store furniture; and, that far forth, it was not void, in any view of the law. This point is sustained by, and is in strict harmony with, the doctrine declared by this court, in *Davenport v. Foulke, supra*.

It will be observed that the appellants have not attacked, nor attempted to impeach, by any of the allegations of their complaint, the good faith of any of the parties to the chattel mortgage, or the validity of the debts thereby secured, or the good faith and fair conduct of the mortgagees in their seizure and sale, under their mortgage, of the mortgaged property, or the good faith and integrity of the appellees, in their subsequent dealings in relation to such property. It is true, that they alleged that the execution of the mortgage tended to hinder and delay them, in the collection of their debts. But this was by no means the equivalent of an allegation that the mortgage was executed with the intent, on the part of any of the parties thereto, to hinder and delay the appellants or other creditors in the collection of their debts. It is true, also, that the appellants alleged that, after the sale of the property under the mortgage, and after the appellee Ward had become the exclusive owner of the property, he opened up the store, and placed the appellee Harding therein. There is no allegation in the complaint, that any fraud was contemplated or committed by either of the appellees in this transaction; and, certainly, no fraud can be inferred from the bare fact alleged, that, after the appellee Ward became the exclusive owner of the property, under the mortgage and freed from the lien thereof, he opened up the store, and placed the appellee Harding therein. *Emmons v. Hawn*, 75 Ind. 356.)

Upon the whole case, our conclusion is that the court committed no error in sustaining the appellees' demurrer to the appellants' complaint.

The judgment is affirmed, at the appellants' costs.

Beck v. Koester et al.

No. 8326.

BECK v. KOESTER ET AL.

JUDGMENT.—*Motion to Set Aside.*—*Notice.*—*Statute Construed.*—A motion for relief from a judgment under section 99 of the civil code of 1852 (R. S. 1881, section 396), is not such a proceeding as justifies notice to the opposite party by publication in a newspaper, as provided by section 38 of the code of 1852 (R. S. 1881, sec. 318).

From the Gibson Circuit Court.

J. E. McCullough and *L. C. Embree*, for appellant.

H. A. Yeager and *P. Maier*, for appellees.

NIBLACK, J.—In April, 1877, Louis Koester and Frederick Korf commenced an action in the court below against Mrs. Elizabeth W. Beck and Francis E. Beck, on a promissory note, and, upon the filing of an affidavit and an attachment bond, procured a writ of attachment to be issued against the property of the defendants. Under that writ the sheriff seized and took into his possession certain property of the defendant Elizabeth W. Beck. The attachment proceedings were, however, afterwards dismissed. Mrs. Beck thereupon commenced an action upon the attachment bond against Koester and Korf, and John Oswald, their surety thereon, in the same court, and, upon a trial by the court, obtained a finding in her favor for the sum of one dollar for her damages. Judgment was afterwards rendered in her behalf for that sum, and for full costs, estimated to amount to something near one hundred and twenty-five dollars.

Before the next term of court the defendants, Koester, Korf and Oswald, filed in the clerk's office their motion, in the form of a complaint in writing, alleging that under the statute (section 398 of the code of 1852), the plaintiff was entitled to a judgment for costs only for an amount equal to the damages assessed, that is to say, for the sum of one dollar; that the judgment in the cause was not entered of record until after the term had expired; that by reason thereof they,

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the defendants, had no opportunity of objecting to the judgment at the time it was entered; that such judgment was entered in the form in which it was by inadvertence and the mistake of the clerk, and asking that the judgment might be so amended that the plaintiff should be allowed to recover only the sum of one dollar for her costs.

The plaintiff having in the mean time become a non-resident of this State, the defendants filed in the clerk's office an affidavit, averring her non-residence and that a cause of action existed against her in their favor. The clerk thereupon caused notice to be published in one of the newspapers of the town of Princeton, notifying her to appear in the court below in an action in which the said Koester, Korf and Oswald were plaintiffs, and she was defendant, and answer the complaint filed against her. At the next term of court after such notice had been published, Mrs. Beck entered a special appearance and moved to set aside the notice on the grounds:

First. That it did not purport to be a notice in the action in which the motion to correct the judgment had been filed, as above set forth.

Secondly. That the proceeding then before the court was one in which notice by publication was not authorized by law.

The motion to set aside the notice was, nevertheless, overruled. Issue was then joined upon the facts alleged in the motion, and the court, after hearing the evidence, ordered the judgment for costs to be amended as prayed for in the motion, and entered judgment accordingly.

Mrs. Beck has appealed and assigned error upon the proceedings on the motion to correct the judgment for costs.

The latter clause of section 99 of the code of 1852, as amended, provides that the court "shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect, and supply an omission in any proceedings on complaint or motion filed within two years;" and it is only under that clause of the statute that we are able to classify the proceedings appealed from in this case.

Budd v. Kraus.

2 R. S. 1876, p. 82. In proceedings under that clause, opposing parties can not be brought into court by the publication of a notice in a newspaper.

Section 38 of the code of 1852, providing for notice by publication in certain cases, has reference only to the commencement of original actions, or to actions in the nature of original actions, and consequently has no application to merely supplemental proceedings like those before us.

Furthermore, if this could in any sense be classed as an original action, it did not fall within the provisions of that section on the subject of constructive notice.

The notice purporting to be published in this cause ought, therefore, to have been set aside as unauthorized by law, and as inoperative against the appellant.

Neither did the evidence sustain the allegations contained in the motion. There was no evidence tending to show that the judgment was not entered until after the close of the term, or to establish any other fact which might reasonably have prevented the appellees from objecting to the judgment complained of at the time it was rendered.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

No. 8756.

BUDD v. KRAUS.

79	137
147	689

CONTRACT.—*Grading Street.*—*Trustees of Town.*—*Complaint.*—A complaint by a contractor against a property owner, to recover an assessment made against him by the trustees of a town for grading the street whereon his property abuts, must be founded upon a written contract and set forth the original or a copy thereof.

SAME.—*Bond.*—*Copy.*—In such case a copy of the contractor's bond is not a sufficient substitute.

Budd v. Kraus.

SAME.—Presumption.—Parol.—A contract not appearing to be in writing must be presumed to be by parol.

SAME.—Estoppel.—Silence.—Mere silence of a property owner having knowledge that work was being done, and failing to object and prevent it by injunction, will not estop him to contest an assessment against him, made without any contract.

SAME.—Work Accepted.—Trustees.—In such case the contractor can not be heard to allege that the property owner received and accepted the grade. The trustees of the town alone could do that.

From the Dubois Circuit Court.

J. F. Dillon and C. H. Dillon, for appellant.

M. B. Williams and B. Buettner, for appellee.

BICKNELL, C. C.—This was a suit by the appellant against the appellee, to recover an assessment by the trustees of the town of Jasper for the grading of Main street.

A demurrer to the amended complaint for want of facts sufficient, etc., was sustained, and judgment was rendered thereupon against the appellant, who now assigns error in sustaining said demurrer.

The first question is, Must a contract by the trustees of an incorporated town, for the grading of a street, be in writing?

In the case of *Overshiner v. Jones*, 66 Ind. 452, this court held that, under the provisions of the statute, sections 8, 9 and 10, of chapter 267, 1 R. S. 1876, p. 893, contracts for such improvements of streets must be in writing. The court said: "There is no averment in the appellee's complaint, that the contract between the town of Elwood and the appellee, under which he claimed the street improvement was made, was a written contract. In the absence of such an averment, and where, as in this case, a copy of the alleged contract has not been filed with, nor made part of, the appellee's complaint, we are bound to presume that the contract is not in writing."

The case last cited strongly resembles the case at bar. In the former there was a written bid for the work; in the latter there was a verbal bid, alleged to have been accepted; but this bid and acceptance are not counted upon as constituting the contract. The only substantial difference between

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the two cases is that the complaint in the case at bar gives the specifications of the work and contains the following averment, to wit: "That the said plaintiff thereupon entered into a written contract with the board of trustees of said town to do said work, etc.; that said contract was duly signed by said plaintiff, together with his sureties, and by the board of trustees, and that a copy of said contract is filed herewith and made part of this complaint, marked Exhibit A." Said Exhibit A, however, is not the contract. It is merely a bond, given by the appellant to the town of Jasper, with a condition that whereas the appellant has been awarded the contract for the grading of Main street, from Second to Sixth street, in said town, the bond shall be void if the appellant shall fulfill said contract. Exhibit A is not the contract on which the assessment was made; it is a bond for the performance of a contract, which contract does not appear to have been in writing, and therefore must be presumed to have been by parol. *Harper v. Miller*, 27 Ind. 277; *The Logansport, etc., R. W. Co. v. Wray*, 52 Ind. 578; *Krutz v. Stewart*, 54 Ind. 178. And the work referred to in the contract mentioned in the bond is the improvement of Main street, between Second and Sixth streets; whereas the work specified in the petition of the lot owners, and stated in the complaint, is the improvement of Main street, between Second street and the public square.

But whatever may be the terms of a bond, given merely to secure a contract, it is not the contract itself, and where the law requires a written contract, and that contract to be made a part of the complaint, the production of a bond to secure an unwritten contract, which bond is nothing more than the conditional promise of the principal and his sureties to pay damages, will not satisfy the law. The complaint was not sufficient, because it failed to show a contract in writing. *Anthony v. Williams*, 47 Ind. 565; *Moore v. Cline*, 61 Ind. 113; *Anthony v. Cooley*, 61 Ind. 323; *City of Indianapolis v. Imberry*, 17 Ind. 175; *Moberry v. City of Jeffersonville*, 38 Ind. 198; *Town of Tipton v. Jones*, 77 Ind. 307.

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The complaint in such a case must show that the town had power to bind the defendant and had legally exercised it. *Moore v. Cline, supra*; *The Town of Covington v. Nelson*, 35 Ind. 532.

The complaint as amended contains the following statement: "That the defendant resided on said street and was present during the time that the work was done, and made no objection to the same, and said improvement benefited said defendant's property abutting on said grade, in the sum of \$1,000, and said defendant received and accepted said grade." It is urged by the counsel of the appellee that these statements show that the defendant ratified the action of the trustees and is estopped from contesting the assessment. There are cases in which it has been held that, where a contract has been made for a street improvement, property owners can not stand by and see the improvement made without effort by injunction to prevent it. *City of Lafayette v. Fowler*, 34 Ind. 140; *City of Evansville v. Pfisterer*, 34 Ind. 36; *Hellenkamp v. City of Lafayette*, 30 Ind. 192; *Palmer v. Stumph*, 29 Ind. 329. The statute provides that after work done under a contract no question of fact shall be tried that arose prior to the contract. 1 R. S. 1876, p. 894, section 10. But there can be no estoppel where the party asserting the estoppel was in no degree influenced by the acts or admissions pleaded in estoppel. *Fletcher v. Holmes*, 25 Ind. 458. Nor unless the party insisting upon the estoppel did something upon the faith of the acts of the other party. *Cox v. Vickers*, 35 Ind. 27. Nor where the facts and the legal rights of the parties are or might have been equally known to both parties. *Foster v. Albert*, 42 Ind. 40; *Hosford v. Johnson*, 74 Ind. 479. The mere silence of the defendant could not make him liable to pay for an assessment made without any contract.

A land-owner who, with full knowledge and without objection, permits another having equal knowledge to level and carry away his soil, may in some cases be estopped from claiming compensation therefor, but his mere silence will not make him liable to pay for the labor.

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No principle of equity or good faith required the defendants in the case at bar to object. The contractor was acting under authority paramount to him; he was acting under the trustees, without regard to the consent or objection of the defendant; the contractor knew or ought to have known, as well as the defendant did, that, unless the trustees made a written contract, their assessment could not be enforced. It does not appear, nor is it alleged in the complaint, that the contractor was influenced in the slightest degree by the alleged inaction of the defendant. The allegation that the defendant received and accepted the grade is mere surplusage; he had nothing to do with accepting the grade; he could not accept it; that was the business of the trustees.

There was no error in sustaining the demurrer to the amended complaint. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and it is hereby in all things affirmed, at the costs of the appellee.

No. 7957.

JOHNSON v. JONES, ADM'R.

DECEDENTS' ESTATES.—*Fraudulent Surrender of Choses in Action.*—*Administrator's Right to Sue.*—*Complaint.*—An administrator, in his fiduciary capacity, as trustee for the creditors, may maintain an action on notes and mortgages surrendered by his intestate without consideration, to defraud creditors; but his complaint must show that his intestate, at the time of the alleged fraudulent transfer, had no other property subject to execution, sufficient to pay his debts.

SAME.—*Pleading.*—*Disposition of Assets by Administratrix.*—In such action, by an administrator *de bonis non*, a complaint alleging that the administratrix, who was the widow, resigned without having administered upon any part of the estate; that the personal estate, except the note sued on, did not exceed five hundred dollars; that the debts amounted to \$8,500,

79	141
149	305
79	141
153	474
79	141
156	631

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and that the decedent died seized of no other property either real or personal, sufficiently shows that the administratrix had made no disposition of any portion of the assets that could have been applied to the payment of debts.

SAME.—Creditor.—Judgment and Execution.—The rule requiring the creditor to proceed with his judgment and execution does not apply where the debtor has deceased.

SUPREME COURT.—Rehearing.—New questions will not be considered by the Supreme Court on petition for a rehearing.

From the Montgomery Circuit Court.

R. P. Davidson, J. C. Davidson, L. McClurg and J. V. Kent, for appellant.

M. Jones, J. L. Miller and J. R. Coffroth, for appellee.

FRANKLIN, C.—The appellee, as administrator of the estate of William A. Fowler, deceased, brought this action against the appellant, seeking, in the first paragraph of his complaint, to set aside a conveyance of lands by said Fowler in his lifetime, to the appellant, on the alleged ground that it had been made to defraud creditors, and in the second paragraph to cancel the surrender of certain promissory notes which had been executed for and in consideration of a part of the same lands mentioned in the first paragraph, and to cancel the satisfaction of a mortgage which had been given by the appellant to secure the payment of said notes, and seeking to obtain a judgment upon said notes and a decree of foreclosure of the mortgage, on the ground that said notes had been surrendered by the appellee's intestate, and said mortgage entered satisfied, with the fraudulent intent to cheat and defraud the intestate's creditors, of which intent the appellant had, as is alleged, notice, and in which he participated; that said notes were not paid, but surrendered without any consideration whatever.

The action was commenced in the circuit court of Clinton county, from which the venue was changed to the county of Boone, where a trial by jury was had, resulting in a verdict for plaintiff on the first paragraph of the complaint, which was set aside by the court, and a new trial granted. The venue

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of the cause was then changed to the county of Montgomery, where a second trial was had, resulting in a judgment for the defendant. From this judgment an appeal was taken by the plaintiff (appellee here) to this court, where it was reversed, upon the ground that the judge had gone into the jury-room in the absence of the parties, and had there given the jury certain oral instructions, during the deliberations of the jury. See *Jones v. Johnson*, 61 Ind. 257.

Upon the second trial, the appellee dismissed his cause of action upon the first paragraph of the complaint, and proceeded upon the second only. Upon the return of the cause from this court, it was again tried before the court, a jury being waived, and, at this last trial, a finding and judgment thereon were entered against the appellant, from which he now appeals.

In the Clinton Circuit Court, at the proper time, the appellant demurred to the second paragraph of the complaint, first, because of want of facts, and, second, because of misjoinder of causes of action. His demurrer was overruled, to which ruling he reserved an exception.

Motions for a new trial, in arrest of judgment, for judgment notwithstanding the finding, and for judgment on the pleadings for appellant, were each overruled, and exceptions reserved.

Appellant has assigned in this court the following alleged errors in the court below :

- 1st. Overruling demurrer to second paragraph of complaint.
- 2d. Overruling motion for a new trial.
- 3d. Overruling motion for judgment notwithstanding the finding.
- 4th. Overruling motion in arrest of judgment.
- 5th. In rendering judgment for appellee.

Appellant's counsel have not referred to, discussed or insisted upon any of the foregoing errors assigned, except the first, and rest their whole claim for a reversal of the judgment on account of the alleged insufficiency of the second paragraph of the complaint. All the other objections to the judgment are therefore waived.

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The first objection made to this paragraph of the complaint is, that it does not show that the widow, the former administratrix, had not received ample assets to have paid all the debts, and what disposition she had made of what she did receive. While the averments in the complaint are not very explicit upon this point, we think it shows enough; it states that the "widow resigned without having executed any part of said estate, and left the matters and things alleged in this complaint unadministered upon and wholly unpaid or settled; that the personal estate (except as hereinafter mentioned)" (referring to the notes and mortgage afterward named), "does not exceed \$500; that the debts of the estate amounted to \$6,500." And, after naming the notes and mortgage, avers "that said decedent died seized of no other property, either real or personal, except as aforesaid." We think these averments sufficiently show that the widow, as such administratrix, had made no disposition whatever of any portion of the assets of the estate.

Deceased died January 6th, 1873. Appellee was appointed administrator October 4th, 1873. The notes and mortgage were executed on the 5th day of April, 1871. They were cancelled and the mortgage record entered satisfied July 13th, 1872. And this \$6,500 of indebtedness existed at the date of the cancellation and satisfaction.

It is further urged as an objection to this complaint, that the property, the alleged fraudulent transfer of which is sought to be set aside and cancelled, was not subject to execution, and, therefore, the action could not be maintained. And quite a number of authorities are cited in support of this objection.

Appellant in his brief states the following proposition: That "no creditor can be said to be delayed, hindered or defrauded by any conveyance until some property, out of which he has a specific right to satisfaction, is withdrawn from his reach by a fraudulent conveyance."

In 1 Story's Equity Jurisprudence, sections 366 and 367, the following language is used: "The point intended to

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be suggested is this, whether, in order to make a conveyance void, as against existing creditors, it is indispensable that it should make a transfer of property, which could be taken in execution by the creditors, or compulsorily applied to the payment of the debts of the grantor; or whether the rule equally applies to the conveyance of any property whatsoever of the grantor, although not directly so applicable to the discharge of debts." And, after referring to the English statute of 13th Elizabeth, the author adds: "That a voluntary conveyance of property not so subject, could not be injurious to creditors, nor within the purview of the statute, because it would not withdraw any fund from their power, which the law had not already withdrawn from it. And that would be a strange anomaly, to declare that to be a fraud upon creditors, which in no respect varied their rights or remedies. Hence, it has been decided that a voluntary settlement of stock, or of choses in action, or of copyholds, or of any other property, not liable to execution, is good, whatever may be the state and condition of the party as to debts."

And the same doctrine has been held to in this court. In the case of *Shaw v. Aveline*, 5 Ind. 380, the court quoted the following language: "In an abstract view, it may appear proper to extend the remedy in favor of creditors to every chose in action of the debtor. But such power has not been conferred on the courts; and it will be the appropriate office of legislative provision to afford such a remedy;" and said: "Whenever the power is deemed desirable, it is better that the Legislature confer it, than that the courts should assume it. It is said in *Lorman v. Clarke*, *supra*, to be a reproach to our jurisprudence that the debtor should be able to secrete his property from execution. But if a reproach, it seems rather to be so to the legislative than the judicial department." This case was followed by the cases of *Totten v. McManus*, 5 Ind. 407; *Stewart v. English*, 6 Ind. 176; *Peoples v. Stanley*, 6 Ind. 410; *Williams v. Reynolds*, 7 Ind. 622. All of which

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were quoted approvingly in the case of *Scott v. The Indianapolis Wagon Works*, 48 Ind. 75. But the court held in this last case that stock in an incorporated company could be reached by a complaint under the provisions of our statute, making it subject to execution.

The doctrine appears to be well settled, that, when a debt can not be coercively collected out of property, a fraudulent transfer of that property can not be interfered with by the creditor.

And prior to the adoption of our code of procedure, a creditor's bill and an attachment and garnishment were the only remedies by which to interfere with fraudulent conveyances. Since its adoption and the distinction between actions at law and suits in equity has been abolished, the rules in relation to a creditor's bill have been somewhat modified. The creditor no longer has to obtain his judgment at law before he can file his creditor's bill to subject property, fraudulently conveyed, to the payment of his debt. He may now combine the two in the same action. And our Legislature has attempted to provide remedies for some of the deficiencies of the old chancery creditor's bill, by providing for proceedings supplemental to execution, by which the creditor, if he can not reach the choses in action of his debtor, can reach the indebtedness of which the choses in action are but the evidences.

Section 17 of the statute of frauds and perjuries, 1 R. S. 1876, p. 506, provides that "All conveyances or assignments in writing or otherwise, of any estate in lands, or of goods, or things in action, every charge upon lands, goods, or things in action, and all bonds, contracts, evidences of debt, judgments, decrees, made or suffered with the intent to hinder, delay, or defraud creditors, or other persons of their lawful damages, forfeitures, debts, or demands, shall be void as to the person sought to be defrauded."

Under this provision of our statutes, if these notes were transferred and surrendered to be cancelled, and the mortgage entered satisfied, without any consideration whatever, for the

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purpose of defrauding creditors, as is charged in the complaint, then the rights of the parties stand as though no such transfer, surrender, cancellation and satisfaction had taken place; and, so far as the rights of creditors are concerned, the debt was still due the deceased at the time of his death.

The rule requiring the creditor to proceed with his judgment and execution does not apply where the debtor has deceased. *Kipper v. Glancey*, 2 Blackf. 356; *O'Brien v. Coulter*, 2 Blackf. 421; *Love v. Mikals*, 11 Ind. 227.

We have an express provision by statute, that an administrator may proceed to set aside a fraudulent conveyance, by deceased, of real estate, for the purpose of making it assets in his hands for the payment of debts. 2 R. S. 1876, p. 527, 3d clause of 84th section. We also have another provision in the statute upon the settlement of decedents' estates, 2 R. S. 1876, p. 546, section 151, which reads as follows: "Every executor or administrator shall have full power to maintain any suit in any court of competent jurisdiction, in his name as such executor or administrator, for any demand of whatever nature due the decedent in his lifetime."

This transfer and cancellation, being fraudulent against creditors, still remained due the decedent at his death.

No question is raised as to the right of the administrator to sue, if the subject-matter of the suit will authorize an action. It is insisted by appellant that the case of *Burt v. Hoettinger*, 28 Ind. 214, prevents the statutory provisions for proceedings supplemental to execution from remedying the defects of the old creditor's bill, because, under those provisions, the fraud could not be enquired into. This case is very modestly criticised in the case of *Scott v. The Indianapolis Wagon Works*, 48 Ind. 75, by calling it "an apparent ruling." But in the case of *The Toledo, etc., R. W. Co. v. Howes*, 68 Ind. 458, it is squarely overruled. That leaves this remedy in force to coerce the collection of a debt from an indebtedness coming to the debtor, the evidences of which (the choses in action), have been fraudulently transferred by the debtor. See the case

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of *Sherman v. Carvill*, 73 Ind. 126. And the enforcement of this remedy is not in conflict with the rule stated in *Bump on Fraudulent Conveyances* and *Story's Equity Jurisprudence*, *supra*.

We think the administrator as trustee for the creditors, in his fiduciary capacity, can maintain this action. *Love v. Mikals*, 11 Ind. 227; *Hess v. Hess' Adm'r*, 19 Ind. 238; *Garner v. Graves*, 54 Ind. 188; *Martin v. Root*, 17 Mass. 222; *Gibbens v. Peeler*, 8 Pick. 254; *Holland v. Cruft*, 20 Pick. 321; *Wall v. Provident Institution, etc.*, 6 Allen, 320; *Babcock v. Booth*, 2 Hill, 181; *Bate v. Graham*, 11 N. Y. 237. A man has no right to give away his assets to his friends or relatives, without reserving property enough to pay his just debts. He must be just before he can be generous.

The other objection urged to the complaint is, that it contains no averment that the deceased, at the time of the alleged fraudulent transfer of the choses in action, had no other property subject to execution sufficient to pay his debts. There is no averment in the second paragraph of the complaint upon this subject; and we think this omission is a fatal objection to it. This point has been frequently decided by this court, and it may now be regarded as well settled in relation to a complaint to set aside a fraudulent conveyance of real estate, that in order to be good it must contain such an averment. And we see no reason why the same rule should not obtain in a complaint to set aside a fraudulent transfer of personal property. See *Wedekind v. Parsons*, 64 Ind. 290, in which some twelve cases in this court are cited in support thereof, and which need not be repeated here. *Rose v. Colter*, 76 Ind. 570; *Noble v. Hines*, 72 Ind. 12.

However long this case may have been in court, for the last named reason, we feel constrained by the rules of the law, to hold that the court below erred in overruling the demurrer to the second paragraph of the complaint. And for this error the judgment below must be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing

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opinion, that the judgment below be, and the same is hereby, in all things reversed, at appellee's costs; and that this cause be remanded to the court below, with instructions to sustain the demurrer to the second paragraph of the complaint and for further proceedings in accordance with this opinion.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Counsel for appellee earnestly insist that this court erred in holding that the court below erred in overruling the demurrer to the second paragraph of the complaint, for two reasons: First. That, while it was not good to set aside a fraudulent transfer of property, it was sufficient to obtain judgment on the notes and a foreclosure of the mortgage by the administrator as the representative of the deceased. Second. That this cause has heretofore been passed upon by this court, and that no question which existed prior to said decision can now be raised in this court.

The cause of action was dismissed as to the first paragraph of the complaint, and the trial was had alone upon the second paragraph.

While the first paragraph contained an allegation, that, at the time of the cancellation and surrender of the notes by deceased to appellant, deceased was of unsound mind, there was no such allegation in the second paragraph. The averments in this are, that he was weak and feeble in mind and body, and that he conspired with the defendant to defraud, cheat, hinder and delay his creditors. There is no charge in this paragraph that the defendant had practiced a fraud upon the deceased. Under the allegations of this paragraph, had the deceased been living, he could not have maintained an action on the notes and for a foreclosure; neither can the plaintiff as his representative.

The only cause of action set out in this paragraph is in favor of appellee as the representative of deceased's creditors. And appellee's counsel admit that it was insufficient for that purpose, for the reason that it did not aver the insolvency of

Hall's Safe and Lock Company v. Rigby.

the deceased, and that he did not reserve property enough to pay all his debts at the time of the alleged fraudulent transfer, and had not so much property at the time of his death. We think there was no error in holding that the court below erred in overruling the demurrer to this paragraph.

As to the second reason, that question was not noticed by the counsel for appellee in their original brief. And it is a rule of this court that new questions in a petition for a rehearing will not be considered when they are such as might have been presented on the original hearing. *Liberty Tp., etc., Association v. Watkins*, 72 Ind. 459; *Board, etc., v. Hall*, 70 Ind. 469; *Danenhoffer v. The State*, ante, p. 75.

We think the original decision ought to be adhered to.

PER CURIAM.—The petition for a rehearing is overruled, at appellee's costs.

No. 6455.

HALL'S SAFE AND LOCK COMPANY v. RIGBY.

BILL OF EXCEPTIONS.—*Time*.—Where sixty days from April 20th were allowed for the filing of a bill of exceptions, the filing of such bill on June 20th, following, was too late.

From the Clay Circuit Court.

W. P. Blair, for appellant.

S. W. Curtis and *E. S. Holliday*, for appellee.

WOODS, J.—It is claimed that the finding and judgment of the circuit court in this case are contrary to the evidence. The evidence, however, is not in the record, and we can not consider the question. The judgment was entered on the 20th day of April, 1877, and sixty days from that time were allowed the appellant for filing his bill of exceptions; but the bill, which is copied into the transcript, was not filed until June 20th, 1877, one day too late.

Judgment affirmed, with costs.

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No. 8996.

JOHNSON v. HOLLIDAY.

79	151
144	401
79	151
149	50

SEDUCTION.—Definition.—Where a man, by promises and persuasions, overcomes the virtue of a woman, it is seduction; but where force is used, or where the woman yields her person to the man, through the promptings of her own lascivious and lecherous desires, there is no seduction.

PRACTICE.—Preponderance of Evidence.—Number of Witnesses.—The preponderance of evidence is not to be determined by the number of witnesses; and, in all cases, the credibility of the witnesses is a question for the determination of the jury or of the trial court.

SAME.—Challenge of Juror for Cause.—Bill of Exceptions.—No available error can be predicated upon the decision of the trial court, in overruling the challenge of a juror for cause, unless the record affirmatively shows, by bill of exceptions or order of court, that it contains the full and complete examination of the juror, on his *voire dire*.

SAME.—Evidence.—Admissions by Silence.—To affect a party with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence; for, if they were in evidence in a judicial proceeding, he is not at liberty to interpose when and how he pleases, though a party, and, therefore, is not concluded. The circumstances must be not only such as afford him an opportunity to act or to speak, but such as would properly and naturally call for some action or reply from men similarly situated.

From the Huntington Circuit Court.

I. Van Devanter, J. W. Lacey, L. P. Milligan, A. Moore, W. A. Bonham and G. W. Harvey, for appellant.

A. Steele, R. T. St. John and H. Brownlee, for appellee.

Howk, J.—This action was commenced by the appellee against the appellant, in the Grant Circuit Court. Afterwards the venue of the action was changed to the Blackford Circuit Court, and from that court the venue of the cause was subsequently changed to the Huntington Circuit Court.

The appellee sued, in this case, to recover damages for her own seduction by the appellant, in a complaint of two paragraphs; to which the appellant answered by a general denial thereof. The issues joined were tried by a jury, and a gen-

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eral verdict was returned for the appellee, assessing her damages in the sum of two thousand dollars. With their general verdict the jury also returned into court their special findings as to particular questions of fact, submitted to them by the appellant under the direction of the court, in substance, as follows:

"1. Was there any promise by defendant to marry the plaintiff? Answer. No.

"2. Did the plaintiff permit the carnal intercourse alleged in the complaint, through the influence of her own sexual desire? Answer. No.

"3. If the defendant had the carnal intercourse with the plaintiff, charged in the complaint, was such intercourse the result of an agreement between the plaintiff and the defendant, that, if the plaintiff would submit to have such carnal intercourse, he, the defendant, would support the plaintiff during her natural life? Answer. No.

"4. What was the condition of the health of defendant during the time of the alleged criminal intimacy between himself and the plaintiff? Answer. Not very good."

The appellant's motion for a judgment in his favor, on the special findings of the jury, notwithstanding their general verdict, was overruled by the court, and his exception was saved to this ruling. His motion for a new trial having also been overruled, and his exception saved to this decision, the court rendered judgment on the general verdict.

In this court the first five errors assigned by the appellant are the decisions of the circuit court, in overruling his challenge for cause to each one of five named jurors. The sixth alleged error is the overruling of the appellant's motion for a judgment in his favor on the special findings of the jury, notwithstanding their general verdict; and the seventh error assigned is the overruling of his motion for a new trial.

The first question discussed by the appellant's counsel, in their brief of this cause, arises under the alleged error of the trial court in overruling the motion for a new trial. It is

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earnestly insisted by appellant's counsel, that the verdict was not sustained by sufficient evidence. Upon this point they preface their argument by the following summary of some of the points decided by the Superior Court of New York in the case of *Hogan v. Cregan*, 6 Robertson, 138, to wit: "In order to constitute seduction, more than the bare fact of criminal connection is necessary. It must have been procured by the use of insinuating arts, wiles and persuasions, on the part of the seducer, to overcome the seduced, without force. If it is the result of a mere mercenary bargain, emanating from or coolly and deliberately entered into by the woman, or if she was compelled by force, it does not come within the legal definition of seduction."

We do not controvert what is thus decided by the Superior Court of New York, but we utterly fail to see its applicability to the case at bar. True, the evidence tended to show that the appellee was abjectly poor, as were also her relations both by blood and marriage, and that she was a dependent cripple. It is true also, that evidence was introduced tending to prove that the appellant boasted of his wealth, and repeatedly promised the unfortunate and friendless woman that he would care and provide for her if she would yield her person to his lustful embraces. She lived on the appellant's farm, in the family of her sister's husband, with whom he boarded. Opportunity favored the appellant, and his promises and persuasions were renewed from day to day, until she finally yielded to his solicitations. This is what the evidence tended to establish, and this was seduction. There was not the slightest evidence that the sexual intercourse between the parties was the result of any bargain, mercenary or otherwise. Nor did the evidence tend to prove that the appellee yielded to the appellant's solicitations, "through the promptings of her own lascivious and lecherous desires." *Bell v. Rinker*, 29 Ind. 267.

But the appellant's counsel further say: "The appellant squarely denies the matters detailed by the appellee upon this

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point. The appellant and appellee are the only witnesses who testify as to the inducement for the connection ; and we submit that the appellee fails to make out her case by a preponderance of evidence, admitting, for the sake of the argument, that the evidence of the plaintiff, standing alone, would make the connection seduction." This argument, as we understand it, proceeds upon the theory that the preponderance of the evidence, in every case, is to be determined by the *number* of the witnesses testifying on each side ; that the preponderance will necessarily be in favor of the party who has the greater number of witnesses on his or her side ; and that, if the number of the witnesses on each side should be equal, then he or she must fail who has the burthen of the issue. We need hardly say that this theory is radically wrong. Courts and juries can not, and ought not to, as a rule, weigh evidence and determine its value and sufficiency by the number of witnesses testifying on each side. The evidence of one witness, even though a party, may, and often ought to have, more weight in the proper decision of the cause than the testimony of a dozen adverse witnesses. It is the province of the trial court and jury to determine the credibility of the different witnesses, and to weigh and reconcile, if possible, their conflicting evidence ; and, if their evidence can not be harmonized, the triers of the facts must determine which of the witnesses are the more worthy of belief. *Rudolph v. Lane*, 57 Ind. 115 ; *Swales v. Southard*, 64 Ind. 557 ; *The Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73 ; *Lane v. Clodfelter*, 67 Ind. 51.

The appellant's counsel next insist that the trial court erred in overruling the appellant's challenges for cause to James C. Favorite, Henry Brown and David Trivenger, who were accepted and sworn as members of the jury to which the issues in this cause were submitted for trial. It would seem from the bill of exceptions set out in the record, that each of the persons named was examined by the parties, under the direction of the court, touching his qualifications as a juror in the trial of this cause. But, on this point, the bill of exceptions

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is manifestly imperfect and incomplete. It fails to show, in any manner, that it contains the full and complete examinations of the several jurors, or that any of them were examined under oath, touching their qualifications as jurors. It seems to be an abbreviated compilation of the proceedings had in empanelling the jury, imperfectly kept and hastily written out; and it does not even purport to be a full and complete copy of all such proceedings. We are of the opinion, therefore, that the alleged errors of the trial court, in overruling the appellant's challenges for cause to any of the jurors named in his assignment of errors, were not so saved in and by the record as to properly present any question for the decision of this court. Of course the appellant was entitled, as was the appellee, to a fair trial of the issues in the cause by a jury of competent jurors. But we can not assume that any of the jurors were incompetent. On the contrary, as all the presumptions are in favor of the rulings and decisions of the trial court, it behooves the party who may wish to claim in this court, that any of those rulings or decisions were erroneous, to so save and present them in the record of the cause as to exclude every reasonable presumption in favor of such rulings or decisions. *Myers v. Murphy*, 60 Ind. 282; *Stott v. Smith*, 70 Ind. 298; *Bowen v. Pollard*, 71 Ind. 177; *Williams v. Potter*, 72 Ind. 354; *Kissell v. Anderson*, 73 Ind. 485; *Smith v. Kyler*, 74 Ind. 575.

In the case at bar, as the appellant failed to make the examinations under oath of the several jurors of the jury, touching their qualifications as such jurors, parts of the record by a bill of exceptions or an order of the court, we can not and do not know from the record, that the appellant challenged for cause any of the jurors, or that the court overruled any such challenges, or, if it did, that it erred in any of such rulings. Therefore, if the appellant did challenge for cause any of the jurors, and if the court did overrule any such challenges, we are bound to presume, in the absence of

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any showing to the contrary, that the court did not err in any such decisions.

One other point is made by the appellant's counsel. It appeared that the appellee had instituted a suit against the appellant, probably a proceeding in bastardy, before a justice of the peace. While the appellee was testifying as a witness, in the case now before us, she was asked by her counsel, with reference to her suit before the justice, to state if the appellant was arrested and taken before the justice, at any time when she was present, "whether he denied the charge there made at all, or not." To this question she answered that "he never said a word;" to which answer the appellant objected. Appellee was then asked, "State if he said anything." And she answered, "He said nothing; no sir, not a word." The appellant's counsel excepted. Appellee was then asked this question: "State whether your testimony, that you gave there, was given in his presence, or how that was." This question was objected to, and the court said: "That testimony of his silence could not be given, and would not be competent." The question was not answered, and no other questions were asked concerning the proceedings before the justice.

It would seem from these proceedings, that the appellee had intended to put in evidence an implied admission by the appellant, of the truth of the appellee's testimony before the justice resulting from his failure to deny her statements as a witness, when made in his presence. But the court very properly, we think, excluded the offered evidence, on the ground of incompetency. The rule on the subject of such evidence is thus stated in note 1 to section 197 of 1 Greenleaf on Evidence: "To affect a party with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence; for, if they were given in evidence in a judicial proceeding, he is not at liberty to interpose when and how he pleases, though a party; and therefore, is not concluded." This rule of evidence has been recognized and approved by

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this court, in several cases. *Pierce v. Goldsberry*, 35 Ind. 317; *Bröyles v. The State, ex rel., etc.*, 47 Ind. 251; *Howard v. Howard*, 69 Ind. 592.

But the appellant's counsel claim that the court erred in allowing the appellee to answer the first two questions above quoted. In regard to this claim, it is enough to say, that the record fails to show any objection, on the part of the appellant, to either of these two questions; and, certainly, it did not show that he stated to the trial court the grounds of his objection to either question. In such a case, the rule is well settled that this court will not, on appeal, consider the question of the admissibility of the evidence, nor any objections made here to its admission. *Rosenbaum v. Schmidt*, 54 Ind. 231; *McCormick v. Mitchell*, 57 Ind. 248; *Hyatt v. Clements*, 65 Ind. 12; *Smith v. Kyler, supra*.

Our conclusion is, that the court committed no error, in overruling the appellant's motion for a new trial.

The judgment is affirmed at the appellant's costs.

No. 8328.

HANSFORD ET AL. v. VAN AUKEN, ADM'R.

79	157
158	449
158	450

JUDGMENT.—*Action on.*—*Jurisdiction.*—An action may be maintained on a judgment in the court which rendered it.

SAME.—*Replevin Bail.*—*Defendant by Confession.*—*Joint Liability.*—*Complaint.*—In such action against the judgment defendant and his replevin bail, the complaint, on demurrer of the bail for want of facts, need not show a joint liability. It is enough that it shows a cause of action against him by his becoming a judgment defendant by confession.

SAME.—*Complaint.*—*"Duly Rendered."*—A complaint alleging that on the 16th day of March, 1877, in the Porter Circuit Court, the plaintiff's intestate, naming her, recovered a judgment, etc., sufficiently shows that the judgment was "duly rendered," and when and where.

SAME.—*Parties.*—*Administrator.*—*Profert of Letters.*—An administrator, suing on a judgment recovered by his intestate, need not allege her death or his appointment, nor make profert of his letters.

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SAME.—*Plea in Abatement.—Decedents' Estates.*—An administrator's right to sue can not be questioned otherwise than by plea verified by affidavit.

SAME.—*Answer.*—An answer to a complaint on a judgment, averring that the defendant has ample property to satisfy the judgment, but has never been called on for property or money, and that an execution issued on the judgment was returned unsatisfied by order of the plaintiff, but containing no averment that any lien was lost thereby, or that the defendant was prejudiced in any way, is insufficient on demurrer.

From the Porter Circuit Court.

T. J. Merrifield, for appellants.

W. Johnston and — *Pagin*, for appellee.

MORRIS, C.—The appellee, as administrator of the estate of Mary Ann Hansford, sued the appellants, alleging in his complaint that on the 16th day of March, 1877, the said Mary Ann Hansford recovered, in the Porter Circuit Court, a judgment against the appellant John Hansford, for the sum of six hundred and fifty dollars; that, by the terms of the judgment, said sum was to become due on the 16th day of October, 1877; that on said day the appellant Hunt acknowledged himself as replevin bail for the stay of execution on said sum of \$650, for one hundred and eighty days, by writing his name as such replevin bail on the record of said judgment; and that he was duly approved as such bail by the clerk of said court; that the stay had expired, the judgment remained in full force and was unpaid; demanding judgment for one thousand dollars.

The appellants severally demurred to the complaint, on the ground that it did not contain facts sufficient to constitute a cause of action. The demurrers were overruled.

The appellants then answered the complaint in four paragraphs. The first paragraph was the general denial.

The second paragraph of the answer stated, that as the instalments of said judgment became due, as stated in the complaint, the defendant Hansford was, and still continues to be, the owner of property, both real and personal, subject to execution, and situate in Porter county, Indiana, abundantly sufficient to satisfy said judgment; and that he had been at

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all times, and still is, ready to turn out said property for sale on execution in sufficient quantities to satisfy said judgment; but that he had never been called upon for property or money on said judgment; that the appellee, on the 1st day of August, 1878, caused an execution to be issued on said judgment, directed and delivered to the sheriff of said county, which was, by the order of the appellee, returned by said sheriff on the 10th day of December, 1878, unsatisfied; and that the defendant now tenders lands in said county, describing them, for sale on execution on said judgment, according to law, to satisfy said judgment, which are of the value of \$4,500, and of which said Hansford is the owner in fee.

The third paragraph, which is pleaded by Hunt alone, is like the second, except that it states that said Hunt had never been called upon for money or property on said judgment; that if he had been he would have turned out property of the said Hansford sufficient to satisfy and pay it. The paragraph avers that said Hunt, as replevin bail, offers to turn out real estate of his co-appellant, for sale on execution on said judgment, sufficient to satisfy the same. The real estate so offered to be turned out is particularly described in the answer, being situate in Porter county, and alleged to have been owned by the appellant Hansford in fee.

The fourth paragraph sets up a payment of \$200.

The appellee replied to the fourth paragraph of the answer and demurred to the second and third separately. The demurrers were sustained.

The cause was submitted to the court for trial. The court found for the appellee. The appellants moved the court for a new trial on the ground that the finding was contrary to law and to the evidence. The court overruled the motion and judgment was rendered for the appellee.

The errors assigned are the rulings on the several demurrers and on the motion for a new trial.

The appellants insist that the complaint is bad as to Hansford, because they say that an action will not lie on a judg-

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ment in the same court in which the judgment sued on was rendered. The law is settled otherwise in this State. *Gould v. Hayden*, 63 Ind. 443; *Davidson v. Nebaker*, 21 Ind. 334. In the former case, HOWK, J., says: "He may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment." *Palmer v. Glover*, 73 Ind. 529.

The appellants insist that the appellee had no authority to sue; that his appointment as administrator of Mary Ann Hansford is not averred, nor is her death alleged. The demurrers to the complaint do not question the appellee's capacity to sue. It was not necessary for him to make proof of his letters, nor can his right to sue be questioned otherwise than by plea verified by affidavit. 2 R. S. 1876, p. 547.

The appellant also insists that the complaint is clearly bad as against Hunt, because it does not show that he was jointly liable with Hansford. Were it conceded that the complaint does not show Hunt to be jointly liable with Hansford, it would not follow that no cause of action is stated in it against the former. The ground of demurrer alleged by Hunt is, that the complaint does not state facts sufficient to constitute a cause of action against him. If it does, though it fails to state facts sufficient to constitute a joint cause of action against him and Hansford, there was no error in overruling his demurrer. The complaint shows that the appellant Hunt, in due form, became replevin bail for the payment of a judgment against his co-appellant, and in favor of the appellee's intestate; that the time allowed by law for the stay of execution on said judgment had expired, and that the judgment remained in full force and was unpaid. Hunt became a party to the judgment by confession, and was properly joined with Hansford

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as a defendant. The facts averred constitute a good cause of action against him, and this is sufficient. *Lane v. The State, ex rel.*, 27 Ind. 108.

It is further said that the complaint does not show when the judgment was rendered, nor that it was duly rendered. The complaint states, that on the 16th day of March, 1877, in the Porter Circuit Court, Mary Ann Hansford recovered a judgment, etc. We think it sufficiently certain in these respects. There was no error in overruling the demurrers to the complaint.

It is also insisted that the court erred in sustaining the appellee's demurrers to the second and third paragraphs of the appellants' answer.

These paragraphs show that the appellants have abundant means, but that they are not willing to pay, except at the end of an execution; they seem to be quite willing that their real estate shall be sold upon execution subject to appraisal, but they are unwilling to pay otherwise. It was for this reason, probably, that this suit was commenced. It may be the most effectual way of enforcing payment of the judgment. There is no statement in the second or third paragraph that any lien was lost on the personal property of Hansford by the return of the execution issued on said judgment, or that the return in any way prejudiced the appellants. There was, therefore, no error in sustaining the demurrers to the second and third paragraphs of said answer.

We have looked through the evidence and think it quite sufficient to justify the finding of the court. There is no available error in the record, and the judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

Wagner v. Kastner.

79	162
126	588

No. 7454.

WAGNER v. KASTNER.

SUPREME COURT.—*Appeal.—Suit Originating Before Justice of the Peace.—Amount in Controversy.—Dismissal.*—Under section 550 of the code of 1852, as amended by the act of March 14th, 1877 (section 632, R. S. 1881), in actions originating before a justice of the peace, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars, appeals will not lie to the Supreme Court, and, if taken, must be dismissed. This is so, whether the interest accrued before or after the commencement of the action.

From the Ripley Circuit Court.

G. Durbin, for appellant.

W. D. Willson and *C. H. Willson*, for appellee.

Howk, J.—This was a suit by the appellee against the appellant upon a promissory note, of which the following is a copy:

“\$50. **OSGOOD, INDIANA**, February 14th, 1878.

“On the 14th day of May, 1878, for value received, I promise to pay to the Hope Fire Insurance Company of Indianapolis, or bearer, fifty dollars, payable at the express office, at Osgood, Indiana, with interest at the rate of ten per cent. after maturity, without any relief whatever from valuation laws. (Signed) **PETER WAGNER.**”

Endorsed: “Hope Fire Insurance Company, *G. W. Suter*, agent.”

The suit was commenced before a justice of the peace of Ripley county. Without waiving any other answer of defence, the appellant answered specially before the justice, setting up certain alleged false and fraudulent representations of the agent of the payee of the note, in bar of any recovery thereon. The trial before the justice resulted in a finding and judgment for the appellee, for the amount of the note and interest, from which judgment the appellant, the defendant below, appealed to the circuit court.

The appellee's demurrer for the want of sufficient facts to the appellant's special answer was overruled by the court, and to

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this ruling the appellee excepted. The cause was tried by the court, and a finding was made for the appellee in the amount of the note and interest; and the appellant's motion for a new trial having been overruled, and his exception saved to this decision, the court rendered judgment on its finding.

In this court the appellant has assigned, as error, the overruling of his motion for a new trial; and as a cross error the appellee has assigned the overruling of his demurrer to the appellant's special answer.

But we are met, *in limine*, with this question: Has this court jurisdiction of this appeal? In other words, will an appeal lie to this court from a final judgment, in a civil action "originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars?" Under section 550 of the code, as amended by an act approved March 14th, 1877, which act became a law on the 2d day of July, 1877, and before the commencement of this action, there can be but one answer to these questions. Acts of 1877, Spec. Sess., p. 59. In cases originating before a justice of the peace or mayor of a city, an appeal will not lie to this court, where, as in this case, the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars. *Dailey v. The City of Indianapolis*, 53 Ind. 483; *Cowley v. The Town of Rushville*, 60 Ind. 327; *The Louisville, etc., Railway Co. v. Jackson*, 64 Ind. 398; and *Painter v. Guirl*, 71 Ind. 240.

This appeal is dismissed, for want of jurisdiction, at the appellant's costs.

ON PETITION FOR A REHEARING.

Howk, J.—In this case, an earnest petition for a rehearing has been presented, which demands from us some further consideration of the point decided in the original opinion.

The appellee sued the appellant upon his note for fifty dollars, and no more, before a justice of the peace of Ripley county, and recovered a judgment for the amount of the note

Clark *et al.* v. Shaw *et al.*

and interest; from which judgment the defendant appealed to the circuit court. There, the trial of the cause by the court resulted in a finding and judgment for the appellee, for the amount of the note and interest; from which judgment this appeal is prosecuted.

In the original opinion, the appeal was dismissed, for the reason that the record disclosed the fact that the suit originated before a justice, and that the amount in controversy, exclusive of interest and costs, did not exceed fifty dollars. In such a case, the section of the statute, cited in the original opinion, expressly provides that an appeal will not lie to this court. But the appellant's counsel says: "The expression in the statute, 'exclusive of interest and costs,' must refer to the interest accrued on the judgment, and not to the accrued interest on the note at the time suit is instituted." It seems to us, however, that interest is none the less interest, because it has accrued before the institution of the suit. The language of the statute is too plain for construction. In suits originating before a justice, an appeal will not lie to this court, "where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars." So the law is written, and so it must be construed.

The petition is overruled, at the appellant's costs.

No. 8834.

CLARK ET AL. v. SHAW ET AL.

SHERIFF'S SALE.—Return.—Execution.—Evidence.—In an action by a judgment debtor against a judgment creditor, to enforce a sale of real estate, parol evidence, in contradiction of the return of the sheriff on the execution, is inadmissible to show that a sale was made.

From the Lake Circuit Court.

M. Wood and *T. J. Wood*, for appellants.

C. N. Morton, for appellees.

Clark et al. v. Shaw et al.

ELLIOTT, C. J.—The complaint of the appellants alleges that appellee Shaw obtained a judgment against them; that execution was issued and levied upon real estate of which they were the owners; that sale was made and the real estate purchased by him. The prayer of the complaint is that Shaw shall be adjudged the purchaser of the property sold by the sheriff, and that his judgment shall be declared satisfied.

The questions in the case arise upon the ruling denying a new trial.

The appellants introduced in evidence the judgment, the execution and the return of the sheriff. The return of the officer states that the execution was levied, the property appraised and notice of sale given, and that several attempts to sell were made. Various writs were issued, and the return upon the last runs as follows: "And on the 19th day of December, 1879, I was enjoined by a restraining order issued by the judge of the Lake Circuit Court from selling or offering to sell the real estate levied upon by virtue of this writ until further order of the court, which restraining order was afterwards dissolved by said court, and the lifetime of this writ having expired, therefore the land levied upon can not be sold, and this writ is returned wholly unsatisfied."

The appellants offered to prove by parol testimony, that a sale was made to Shaw, but the court excluded the evidence. This ruling was right. The return of a sheriff can not be contradicted in such a case as this. *Splahn v. Gillespie*, 48 Ind. 397; *Stockton v. Stockton*, 59 Ind. 574.

The sheriff is, it is true, a party to this action, but the complaint shows no cause of action against him. The rule which governs in cases where the sheriff is sued for making a false return can have no force in a case like this, where the purpose of the action is to enforce a sale against the judgment plaintiff who purchases at the sale made by the sheriff.

Judgment affirmed.

McGregor v. City of Logansport.

No. 8484.

MCGREGOR v. CITY OF LOGANSPORT.

CITY.—City Judge.—Office Rent.—Void Contract.— It is unlawful for any officer of a city to be a party to, or in any manner interested in, any contract or agreement with the city, whereby any liability or indebtedness may be incurred by the city. And the common council of a city can not make a valid contract with the city judge for the use of his office as a city court room.

From the Cass Superior Court.

S. T. McConnell and *T. J. Tuley*, for appellant.

J. C. Nelson, for appellee.

WOODS, J.—The appellant was elected and served a term as city judge of the city of Logansport, under the act of March 12th, 1875. 1 R. S. 1876, p. 314. This action was brought to recover the rental value of the room occupied by the appellant as a city court room, it being averred that the room was in the possession of the appellant as lessee of another, and that the appellee, by a resolution of its common council, designated it as the place where the city court should be held, from which, as the appellant claims, there arose an implied promise on the part of the appellee to pay him the reasonable value of the use and occupation.

By the 52d section of the act concerning cities, 1 R. S. 1876, p. 288, it is provided that "No member of the common council, or other officer of such city shall, either directly or indirectly, be a party to or in any manner interested in any contract or agreement with such city for any matter, cause or thing by which any liability or indebtedness is in any way or manner created against such city; and if any contract should be made in contravention of the foregoing provisions, the same shall be null and void."

The specific ruling of which the appellant complains is the refusal of the court to admit in evidence the record of the proceedings of the common council, and certain parol evidence in support thereof, for the purpose of showing the adoption

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of the resolution whereby the appellant's room was designated as the city court room. There was no error in the ruling; because, conceding without deciding, that it was within the power and duty of the common council of the city to provide a court room at the expense of the city, it was not competent for the council to enter into a contract for the room with the appellant, who was at the time an officer of the city. *City of Fort Wayne v. Rosenthal*, 75 Ind. 156.

Judgment affirmed, with costs.

No. 9955.

HOLBROOK ET AL. v. MCCLEARY ET AL.

WILL.—Residuary Devise.—Lapsed Legacy or Devise.—In this State, there is no distinction between a void or lapsed legacy or bequest of personal estate, and a void or lapsed devise of real estate. But a void or lapsed devise of real estate, like a void or lapsed legacy, goes into the residuum and passes, under the residuary clause of the will, to the surviving residuary devisees and the descendants of such of them as have died leaving descendants, to the exclusion of the testator's heirs who are not named in such residuary clause.

From the Kosciusko Circuit Court.

W. S. Marshall, for appellants.

A. G. Wood and — *Brubaker*, for appellees.

Howk, J.—This was a suit by the appellants to quiet their title to certain real estate in Kosciusko county, against the unfounded claims, as alleged, of the appellees in and to said real estate. The joint demurrer of the appellees to the appellants' complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, was sustained by the court, and to this ruling the appellants excepted. They failed to amend their complaint, or to plead further, and judgment was rendered against them for the appellees' costs.

79	167
130	62
79	167
152	121
152	303

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Error is assigned here by the appellants which calls in question the decision of the circuit court in sustaining the demurrer to their complaint. The question here, as in the circuit court, depends for its proper decision upon the construction which must be given to the last will and testament of Ephraim McCleary, deceased, under or in connection with the facts alleged in the complaint. Ephraim McCleary died testate, on the 16th day of May, 1880, seized in fee simple of the real estate in controversy. His will was executed on the 5th day of April, 1875, more than five years before his death, and, as it is short, we will set it out in this connection, as follows:

"This indenture witnesseth, that I, Ephraim McCleary, of Wayne township, Kosciusko county, Indiana, farmer, considering the uncertainty of life, do make and publish this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made:

"*First.* I give and bequeath to my beloved wife, Rachel McCleary, during her life, the rents and profits of the south half of the south-west quarter of section fourteen, and the north half of the north-west quarter of section twenty-three, in township thirty-two north, of range six east, being the place or farm on which we now reside, said tract in all one hundred and sixty acres. Also, I give her all my household goods, of which I shall die seized, to be by her used and enjoyed during her life; also, two cows and all hogs on the premises. My other heirs are as follows: Rachel Smith, my daughter, also Mary Anderson (now dead), Joseph McCleary, my son, Margaret Fleck, my daughter, Matilda Drukamiller, my daughter, George Washington McCleary, my son, Adelia McGinley, my daughter, Ephraim Johnson McCleary, my son, and Catharine Holbrook, my daughter.

"To my son, Joseph McCleary, I give and bequeath one dollar, having heretofore deeded him forty acres of land, for which he has not receipted.

"My daughter, Mary Anderson, being dead and having

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four children named respectively Mary Alice, Joseph, John Edgar, and Matilda, the children, or such of them as may be living, when this will goes into effect, will be entitled to her share.

"To my son, George Washington McCleary, I give and bequeath one dollar, having deeded him heretofore forty acres of land.

"To my son, Ephriam Johnson McCleary, I give and bequeath one dollar, having heretofore deeded him forty acres of land.

"To my sons, Washington and Johnson, I give and bequeath my reaper and mower combined, also my horse-rake, to be by them mutually used.

"The residue of my property, both real and personal, which may be left at the decease of my wife, is to be divided equally, share and share alike, among my six remaining children, Rachel Smith, Mary Anderson's children, Margaret Fleck, Matilda Drukamiller, Adelia McGinley and Catharine Holbrook."

It was alleged in the appellants' complaint, that the testator's widow, Rachel McCleary, had died on the 3d day of May, 1881, and that the testator's daughter, Rachel Smith, named in his will, had departed this life intestate, and without issue, about nine months before the testator's death. It will be seen from the testator's will, that the said Rachel Smith was one of his six daughters, to whom he devised his real estate, after the death of his wife, in six equal shares. If the said Rachel Smith had survived the testator, she would have taken an estate in fee, under his will, in the one-sixth part of his real estate. But she died without issue, before the testator, and the question for decision in this case is as to the one-sixth part of his real estate which the testator intended, by the terms of his will, that the said Rachel Smith should have as her share thereof. The appellants, who are the surviving daughters of the testator, named in the will, and the children of such as were dead, claim that the devise of the tes-

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tator to his six daughters is a residuary devise, and that, by the death of Rachel Smith, without issue, before the testator's death, her intended share of the devise lapsed into the residuum, and passed to the surviving devisees, named in the devise. There can be no doubt, we think, that the personal property of the testator, mentioned in the residuary clause of his will, upon the facts of this case, passed to the five surviving daughters named in such clause. This point was expressly decided by this court in *Gray v. Bailey*, 42 Ind. 349. In a will of personal estate, the rule is well established that all lapsed or void legacies will pass by a general residuary bequest to the residuary legatees. *Hayden v. Stoughton*, 5 Pick. 528; *James v. James*, 4 Paige, 115; *Greene v. Dennis*, 6 Conn. 292; *Cambridge v. Rous*, 8 Ves. 12; *McLeod v. Drummond*, 17 Ves. 152.

It is said, however, that there exists an important distinction between a void or lapsed bequest of personal estate and a void or lapsed devise of real estate, which obtains both in England and America, in this, that the former falls into the residuum and the latter goes to the heir. 2 Redf. on Wills, p. 117. The reason generally assigned for such distinction has been the different operation of a will upon personal and real estate. It is said, that, as to personal estate, the will would operate upon all the personal estate held by the testator at the time of his death; while, as to his real estate, the testator could only devise such as he owned at the time of making his will. It is certain, we think, that the reason thus given for the supposed distinction has long since ceased to exist, if it ever existed, in this State. Here, the testator's will of personal estate must be executed with precisely the same solemnity and formality as the will devising real estate; and there is no perceptible or practical difference in the operation of a will upon personal estate and upon real estate.

Thus, in section 2 of the act of May 31st, 1852, prescribing who may make wills, etc., it is provided that every devise, in terms denoting the testator's intention to devise his entire

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interest in all his real or personal property, shall be construed to pass all of the estate in such property, which he was entitled to devise at his death. 2 R. S. 1876, p. 571. So, also, in section 13 of the same act, it is provided that whenever any estate, real or personal, shall be devised to any descendant of the testator, and such devisee shall die during the lifetime of the testator, leaving a descendant who shall survive such testator, such devise shall not lapse, but the property so devised shall vest in the surviving descendant of the devisee, as if such devisee had survived the testator, and died intestate. 2 R. S. 1876, p. 573.

Two things are manifest, as it seems to us, from this legislation: 1. That the distinction between a void or lapsed bequest of personal estate, and a void or lapsed devise of real estate, given in Redfield on Wills, *supra*, has no place in the law of this State; and 2. That the Legislature of this State, in the section of the statute last cited, has impliedly, at least, placed lapsed devises of real estate, and lapsed bequests of personal estate, on precisely the same footing.

In these respects the legislation of the State has been similar in effect to that of Massachusetts. In *Prescott v. Prescott*, 7 Met. 141, it was held by the Supreme Court of Massachusetts, in view of the legislation of that State, that its effect was to remove the distinction between real and personal estates, so that lapsed devises and lapsed legacies would alike pass to the residuary legatee or devisee. So, in *Thayer v. Wellington*, 9 Allen, 283, the same learned court again held, that there was no distinction, in that State, between a lapsed devise of real estate and a lapsed bequest of personal estate, as to the question whether or not it passed under a general residuary clause in the will; and that a lapsed devise or a lapsed bequest would pass under a general residuary clause, to the residuary devisees or legatees, unless the will showed a clear intention, on the part of the testator, to the contrary.

The doctrine of these Massachusetts cases seems to us to be much the better rule; and, as it is in strict harmony with,

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and fully warranted by the legislation of this State, we must approve and adopt it, in the case at bar. Here, the testator's devise to Rachel Smith, by reason of her death without issue or descendant, during the lifetime of the testator, lapsed into the residuum and passed, under the general residuary clause of the will, to the surviving residuary devisees and the descendants of such of them as had died leaving descendants, to the exclusion of the testator's heirs, who were not named in such residuary clause.

We are of the opinion, therefore, that the appellants' complaint stated facts sufficient to constitute a good cause of action in their behalf against the appellees, and that the circuit court erred in sustaining the demurrer to the complaint.

The judgment is reversed, at the appellees' costs, and the cause is remanded with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

No. 8592.

PANCOAST ET AL. v. TRAVELERS INSURANCE COMPANY.

PRACTICE.—Court Rule.—Costs.—A rule of court providing that "motions to require security for costs must be made at the first calling of the docket, unless the affidavit upon which the motion is based shows that the plaintiff's non-residence was not known to the defendant or his attorney, and that it is made as soon as the fact comes to his knowledge," is valid.

MORTGAGE.—Foreclosure.—Mortgagor.—Estoppel.—A mortgagor, with covenants for title, is estopped from pleading, to a complaint to foreclose, that he had, when the mortgage was executed, no title to the mortgaged premises, or to a part thereof.

SAME.—Practice.—Parties.—In a suit to foreclose a mortgage, the refusal of leave to persons claiming title paramount to that of the mortgagor, to become defendants, is not available error.

SAME.—Estoppel.—Foreign Corporations.—One who deals with a foreign corporation, by borrowing its money and giving security therefor by mort-

79	172
139	498
79	172
168	551

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gage, is estopped from answering in a suit to foreclose, that the plaintiff had "no authority to loan money in Indiana," without showing that by such loan the corporation violated its charter or some law prohibiting the loan.

INTEREST.—*Usury.*—A contract for a rate of interest, lawful where the contract is made and where the parties contemplate its enforcement, is valid though the rate of interest exceed that which is allowed at the place fixed for payment.

DAMAGES.—*Remittitur.*—*Supreme Court.*—Where, by reason of a mere error in computation, the damages assessed are excessive, the Supreme Court will affirm the judgment at the costs of the appellee on condition that he remit the excess within a definite period, otherwise the judgment will be reversed.

From the Jasper Circuit Court.

C. H. Test and *J. Coburn*, for appellants.

F. H. Levering, *S. P. Thompson* and *T. Thompson*, for appellee.

FRANKLIN, C.—Jonathan Pancoast obtained a loan of four thousand dollars from the Travelers Insurance Company, on the 6th day of February, 1875, for which he executed a note to said Insurance Company, payable five years after said date, and ten interest notes for two hundred dollars each, falling due semi-annually thereafter, with ten per cent. interest after maturity. And to secure the payment of said notes he mortgaged to said Insurance Company certain lands therein described.

The interest notes payable in six, twelve and eighteen months, were paid. And, at the time the complaint in this cause was filed, the notes payable in twenty-four, thirty, thirty-six and forty-two months after date, were due and unpaid.

The complaint is upon all of the unpaid notes and for a foreclosure of the mortgage, alleging that the whole debt was due under a clause in the mortgage, which states "that if any part of the debt secured by this mortgage is not paid when due, or within twenty days thereafter, then the whole debt hereby secured shall, at the option of the mortgagee, be deemed due and shall be collectible at any time after such default."

The cause was called in court on the forenoon of the second

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day of the next term of the court, and the defendant was ruled to answer. In the afternoon of the same day the defendant moved for a rule to require the plaintiff to file security for costs, which was overruled by the court and an exception taken. The defendant then filed an answer in four paragraphs, the first of which was a denial. In the second he alleges that two of his children owned a one-sixth interest in a part of the lands mortgaged at the date of the mortgage, and asking that they be made co-defendants and be permitted to defend as to their interest. In the third paragraph he alleges that the notes are payable in Hartford, Connecticut, and that the highest rate of interest allowed by the State of Connecticut is six per cent. per annum; that this contract bears ten per cent. per annum, and the excess is usurious. In the fourth paragraph he alleges that the plaintiff has no authority to loan money in the State of Indiana, and that the contract is void. The plaintiff demurred to the second, third and fourth paragraphs of the answer. The demurrer was sustained as to the second and fourth, and overruled as to the third, and exceptions were reserved.

The two children then filed a petition asking to be made defendants, alleging the same facts set forth by the second paragraph of defendant's answer, which petition was overruled by the court and an exception reserved.

A reply was filed in denial, and a special paragraph alleging that the contract was made in Indiana, was to be enforced in Indiana, and was governed by the laws of Indiana, and not by the laws of Connecticut. To which a demurrer was overruled. Trial by the court, finding for plaintiff, motion for a new trial overruled, exception reserved, and judgment for the plaintiff.

The first error assigned is the overruling of appellants' motion to require appellee to file security for costs.

This ruling was made under a rule of the court previously adopted, controlling such motions, and which reads as follows: "Motions to require security for costs must be made at the first calling of the docket, unless the affidavit upon which the motion is based shows that the plaintiff's non-res-

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idence was not known to the defendant or his attorney, and that it is made as soon as the fact of such non-residence comes to his knowledge. When the motion is sustained the plaintiff will be required to file the undertaking for costs on the following day."

It is competent for circuit courts to make such rules for their government as are not repugnant to the laws of this State. 2 R. S. 1876, p. 9, section 14. If the rule in question is not repugnant to any law of this State, then it must stand. In the case of the *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48, p. 57, the court says: "A rule which would deprive a party of any right secured to him by the constitution or the principles of the common law in force in this State, would be repugnant to the laws of this State." Upon the same page, the court further says: "It is also competent for the court to determine by rule when an application for security for costs shall be made." And a rule upon this subject, very similar to the one under consideration, was in that case upheld by this court. Similar rules upon the subject of the changes of venue have repeatedly been sustained by this court. See *Redman v. The State*, 28 Ind. 205; *Galloway v. The State*, 29 Ind. 442. In the former case the court says: "The rule of the court, copied above, though a rigid one, we do not think is repugnant to the statute. It does not deny the right of a party to demand a change of venue for the causes specified in the statute, but only limits the time in the progress of the cause in which the application must be made, in reference to which the statute is silent." The latter case adhered to the ruling in the former case.

Rules, in very nearly the same language as the one under consideration, and identical in purpose, were sustained in the cases of *Vail v. McKernan*, 21 Ind. 421; *Reitz v. The State, ex rel.*, 33 Ind. 187.

The court committed no error in overruling the motion.

The second assignment of error is the sustaining of the demurrer to the third paragraph of the answer. This is a

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clerical error in the assignment. The demurrer was overruled as to the third paragraph, but sustained as to the second. And the assignment was doubtless intended to be made upon the ruling on the second, instead of the third. As the parties have so treated it in their briefs, we will so consider it.

The second paragraph of the answer was an attempt on the part of the mortgagor to attack his own title to the mortgaged premises, both at the date of the mortgage and the time of the trial, the mortgage containing a covenant of warranty.

This he could not do. He is bound by and estopped from denying his title to the mortgaged premises at the date of the mortgage, and, where in the mortgage he has warranted the title, any title that he might subsequently acquire would enure to the benefit of the mortgagee. *Jones Mortgages*, secs. 561, 679, 682, 825, 1483 and 1656. The rule is clearly stated in sec. 682, and the following authorities are cited: *Cross v. Robinson*, 21 Conn. 379; *Wires v. Nelson*, 26 Vt. 13; *Bailey v. Trustees of Lincoln Academy*, 12 Mo. 174; *Floyd County v. Morrison*, 40 Iowa, 188; *Franklin v. Twogood*, 18 Iowa, 513; *Tefft v. Munson*, 57 N. Y. 97; *Usina v. Wilder*, 58 Ga. 178; *Lincoln v. Emerson*, 108 Mass. 87; *San Francisco v. Lawton*, 18 Cal. 465; *Bybee v. Hageman*, 66 Ill. 519; *Boisclair v. Jones*, 36 Ga. 499; *Strong v. Waddell*, 56 Ala. 471; *Hanna v. Shields*, 34 Ind. 84; *Plowman v. Shidler*, 36 Ind. 484; *Church v. Fisher*, 40 Ind. 145; *Jackson v. Fostbender*, 45 Ind. 305; *Stahl v. Hammontree*, 72 Ind. 103.

The application of Abner C. and Lillie E. Pancoast to be made parties defendants, and be permitted to defend as to their interest in the mortgaged premises, presents a more difficult question. *Jones on Mortgages*, section 1445, lays down the rule to be as follows: "It is not proper in a foreclosure suit to try a claim of title paramount to that of the mortgagor. The only proper object of the suit is to bar the mortgagor and those claiming under him. Whether the claim of title be made under a conveyance by a third party prior to the mortgage or subsequent to it, it is not a proper subject of

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determination in a foreclosure suit; nor is a claim under a conveyance by the mortgagor made prior to the mortgage. Such adverse claims of title are generally matters of purely legal jurisdiction." And the following authorities are referred to in support thereof: *Pelton v. Farmin*, 18 Wis. 222; *Palmer v. Yager*, 20 Wis. 91; *Summers v. Bromley*, 28 Mich. 125. In which case the court says: "A court of equity is not the appropriate tribunal, nor is a foreclosure suit a suitable proceeding, for the trial of claims to the legal title which are hostile and paramount to the interest and rights and titles of both mortgagor and mortgagee. Such a trial will neither fall in with the nature of the jurisdiction, or the genius or frame of the particular remedy." Reference is made to the cases of *Rathbone v. Hooney*, 58 N. Y. 463; *Merchants Bank v. Thompson*, 55 N. Y. 7; *Brundage v. Domestic, etc., Society*, 60 Barb. 204; *San Francisco v. Lawton*, 18 Cal. 465; *Kelsey v. Abbott*, 13 Cal. 609; *Corning v. Smith*, 6 N. Y. 82; *Lewis v. Smith*, 9 N. Y. 502.

We think there was no available error in the court's overruling the motion of these parties to be made co-defendants, as complained of by appellant in his fourth specification of errors.

The third error complained of is the sustaining of the demurrer to the fourth paragraph of the answer.

A mortgagor, after having dealt with the mortgagee, can not deny the right of the mortgagee to accept the mortgage. Bigelow on Estoppel, p. 424, uses the following language: "The execution of a mortgage to a corporation, therefore, is an admission of the competency of the corporation to enforce its rights thereunder." A number of cases are therein cited in support of the same.

Appellant borrowed appellee's money, and gave the appellee the mortgage in question to secure its repayment. And, by contracting with appellee, he admitted its right to enforce the mortgage. To hold otherwise would be to encourage and sanction dishonest dealing.

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This court has repeatedly held that a party who contracts with a corporation, as such, is estopped from denying its existence or proper organization. *McBroom v. Corporation of Lebanon*, 31 Ind. 268; *Ray v. Indianapolis Ins. Co.*, 39 Ind. 290; *Vater v. Lewis*, 36 Ind. 288.

Although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the charter of the corporation, or of any statute prohibiting it, the contract will be enforced against the corporation. *State Board v. Citizens Street R. W. Co.*, 47 Ind. 407.

If such contract is valid against the corporation, it would also be valid in favor of the corporation. We know of no law in this State that prohibits any corporation from loaning money, and there is no averment in this paragraph of the answer, that such act would be a violation of any of the provisions of appellee's charter.

The following authorities support the foregoing: *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Steam Boat Co. v. McCutcheon*, 13 Pa. St. 13; *Mott v. The United States Trust Co.*, 19 Barb. 568; *The Steam Navigation Co. v. Weed*, 17 Barb. 378; *The Southern Life Ins., etc., Co. v. Lanier*, 5 Fla. 110; *The San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Argenti v. City of San Francisco*, 16 Cal. 255.

The doctrine of the foregoing authorities is, that a party to a contract is estopped from urging his discharge from liability on it, by reason of the other's want of authority to make it.

We presume, however, that a contract made by a corporation in relation to a matter entirely outside of its corporate powers, and foreign to its corporate purposes, would be *ultra vires* and form an exception to the foregoing doctrine. But we do not think this contract was of this last named class. There was no error in sustaining the demurrer to the fourth paragraph of the answer.

The last point made upon the assignments of errors is, that the notes and mortgage were made payable in the State of Connecticut; the law of that State should control the inter-

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est and not the law of this State, and that the notes were usurious.

It is true that the notes and mortgage are made payable at Hartford, in the State of Connecticut. But it is true that they were executed in this State, the mortgagor lives in this State, the lands lie in this State. And from the terms of the mortgage it is clear that the intention of the parties was that the contract was to be enforced in this State. The mortgage could be enforced nowhere else. In such a case the law of this State governs, the rate of interest being fixed in accordance with the laws of this State. Where the parties reside in different States they may contract at a rate of interest allowed by either State, provided it be done in good faith, without an attempt to evade the usury law. *Townsend v. Riley*, 46 N. H. 300; *Peck v. Mayo*, 14 Vt. 33.

In the case of *Fisher v. Otis*, 3 Chand. Wis. 83, it was held that "A security made in one State where the interest by law is twelve per cent., but payable in another State where interest is restricted to six per cent., is good, where a recovery is sought in the State where it was given. The *lex loci contractus* controls the construction and validity of the contract. A contract valid where it is made, is valid everywhere, except it is shown that the contracting parties intended to be governed by the laws of the country where performance was to be made." This case was adhered to in *Fisher v. Otis*, 3 Pinn. (Wis.) 78, and the same principle was held to in *Newman v. Kershaw*, 10 Wis. 333-340.

In the case *Chapman v. Robertson*, 6 Paige, 627, the Chancellor uses the following language: "But if a contract for the loan of money is made here, and upon a mortgage of lands in this State which would be valid if the money was payable to the creditor here, it can not be a violation of the English usury laws; although the money is made payable to the creditor in that country and at a rate of interest which is greater than is allowed by the laws of England. This question was fully and ably examined by Judge MARTIN in the case of

Hillenbrand *et al.* v. Wittkemper.

Depeau v. Humphreys, in the Supreme Court of Louisiana, (20 Martin's Rep. 1); and that court came to the conclusion, in which decision I fully concur, that in a note given at New Orleans, upon a loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, although the rate of interest thus agreed to be paid was higher than that which could be taken, upon a loan, by the laws of the State where such note was made payable."

This case, we think, states the law correctly. There have been a number of cases decided by this court, in which it has been held that, where no rate of interest has been fixed, the law of the place where payable will govern. See *Gray, Governor, v. The State, ex rel. Coghlen*, 72 Ind. 567, and cases cited.

The court below did not err in overruling the demurrer to the second paragraph of the reply.

The only point made on the motion for a new trial is, that the damages are excessive.

We have examined the calculation of interest and find that the judgment is for \$55.30 too much.

We find no other error in this record. If appellee will remit that amount the judgment ought to be affirmed; otherwise reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that if appellee will remit within sixty days, \$55.30, the judgment below, with said remittitur, be and it is in all things affirmed, otherwise reversed, at appellee's costs.

No. 8607.

HILLENBRAND ET AL. v. WITTKEMPER.

PLEADING.—*Practice.—Competency of Evidence.*—Where the plaintiff sues upon an open account, wherein it is charged that the defendants are indebted to him for certain personal property sold and delivered at a certain price, evidence tending to prove that the property was worth the price charged is competent.

Hillenbrand *et al.* v. Wittkemper.

From the Ripley Circuit Court.

W. D. Willson and *C. H. Willson*, for appellants.

L. L. Perrin and *G. Durbin*, for appellee.

Howk, J.—This suit was commenced by the appellee against the appellants, before a justice of the peace of Ripley county, to recover a balance of an account. The trial of the cause before the justice resulted in a judgment for the appellants against the appellee, from which the latter appealed to the circuit court. There, the cause was tried by a jury, and a verdict was returned for the appellee, and, over the appellants' motion for a new trial, and their exception saved, the court rendered judgment accordingly.

The overruling of their motion for a new trial is the only error assigned by the appellants in this court. Two causes only were assigned for such new trial, as follows:

1. The verdict of the jury was not sustained by sufficient evidence; and,
2. Error of law, occurring at the trial, in admitting evidence of the value of barley on the 8th day of August, 1878.

This second cause for a new trial is the only one discussed by the appellants' counsel, in their brief of this case.

The appellee sued to recover a balance alleged to be due him on three wagon-loads of barley, sold and delivered by him to the appellants. By way of counter-claim, the appellants alleged that, on the 8th day of August, 1878, they entered into a contract with appellee, by the terms of which he agreed to sell to the appellants one hundred bushels of old barley at thirty-five cents per bushel, and two hundred bushels of new barley at forty cents per bushel, and all of said barley to be delivered by him to them, in Batesville, in said county, as soon as the new barley was threshed; and that the appellants then paid appellee ten dollars as earnest money, and were to pay him the balance as soon as all the barley was delivered. The appellee's breach of this agreement was properly pleaded, with such allegations of fact as tended to show that appel-

Hillenbrand et al. v. Wittkemper.

lants were damaged by such breach; and they averred that they had at all times been ready and willing to pay for said barley the contract price when it had all been delivered; and that, by reason of appellee's breach of said contract, they had been damaged in the sum of two hundred dollars, for which they demanded judgment.

On the trial below, the appellant John Hillenbrand was a witness for the appellants. The bill of exceptions shows that, on his cross-examination, he was asked by appellee the following question, to wit: "What was new barley worth on the day you bought the barley from the plaintiff?" To which question and the answer thereto, the defendants objected, because the value of barley at that time is immaterial; but the court overruled the objection, and the defendants excepted. The witness then answered: "In Cincinnati, it was worth fifty or sixty cents; in Batesville, it was worth forty cents per bushel." The same question was propounded to two other witnesses, and, over the appellants' objections that it was immaterial, the court allowed the questions to be answered.

We are of the opinion that the court committed no error in admitting the offered evidence, or in requiring the witnesses to answer the questions objected to. There were two causes of action on trial before the court and jury, the one stated in the appellee's complaint, and the other alleged in the appellants' counter-claim. The appellee sued the appellants upon an open account, in which he charged that they were indebted to him for so many bushels of barley, at so much per bushel. As to his cause of action, the appellee had the burthen of the issue. He had to prove not only the number of bushels of barley he sold and delivered to the appellants, but the value thereof per bushel. The evidence objected to was material and competent, as tending to prove that the barley was worth what he charged in the account sued upon.

The motion for a new trial was correctly overruled.

The judgment is affirmed, at the appellants' costs, with ten per centum damages.

 Long v. Town of Brookston.

No. 8485.

LONG v. TOWN OF BROOKSTON.

79	183
162	556

PRACTICE.—*Motion to Dismiss.*—*Bill of Exceptions.*—In order to present any question upon the overruling of a motion to dismiss an action, there must be in the record a bill of exceptions.

SAME.—*Demurrer.*—No question is presented in respect to a ruling upon a demurrer, unless the demurrer is in the record.

SAME.—*Motion in Arrest.*—*Complaint.*—*Town Ordinance.*—A judgment in favor of the plaintiff upon an amended complaint consisting entirely of a copy of a section of a town ordinance, unaided by any averment, should on motion have been arrested.

From the White Circuit Court.

J. H. Wallace, S. A. Huff and G. W. Galvin, for appellant.

WOODS, J.—The appellee sued the appellant before a justice of the peace, to recover a penalty for the failure of the appellant to comply with an ordinance of the town. On appeal to the circuit court the appellant moved the court to dismiss the action, whereupon the appellee interposed a motion for leave to amend, and, upon leave granted, filed an amended complaint, and the court then overruled the motion to dismiss. But, as there is no bill of exceptions in the record to show the motion, or the ground on which it was predicated, or the ruling of the court and the appellant's exception, no question is presented upon this part of the record.

The next error complained of is the overruling of the demurrer to the complaint; but, as the demurrer is not in the record, the ruling can not be considered.

The motion in arrest, according to the record before us, should have been sustained. The amended complaint, as set out in the transcript, which seems to be properly certified, consists entirely of what appears to be the first section of an ordinance of the town, accompanied with no averments whatever, tending to show a cause of action against the appellant.

The original complaint was defective, but, even if good, it was abandoned, and superseded by the filing of an amended

 Steel v. Grigsby *et al.*

complaint, which is insufficient to support a judgment of any kind in favor of the appellee.

The judgment is therefore reversed, with costs, and with instructions to sustain the motion in arrest.

79	184
128	120
79	184
142	606

 No. 8692.

STEEL v. GRIGSBY ET AL.

EASEMENT.—*Prescription.*—*Way of Necessity.*—*Complaint.*—*Evidence.*—Where a complaint to have a right of way declared a permanent easement shows that for more than thirty years plaintiff, and those under whom he claims, have used it under claim of right, having no other way from his land to the highway; that the defendant has denied his right and fenced up the way; and that without the way his land would be of but little value and he would be subjected to great hardships and be deprived of the use of his land as a home, evidence of a way of necessity is admissible.

SPECIAL FINDING.—*General Finding.*—*Practice.*—Where the record does not show that either party requested the court to make a special finding, the finding will be held to be a general finding only.

From the Posey Circuit Court.

E. M. Spencer and *W. P. Edson*, for appellant.

A. P. Hovey and *G. V. Menzies*, for appellees.

FRANKLIN, C.—This is an action by the appellees against the appellant to have a right of way declared a permanent easement. For some years prior to 1868, one James T. Overton owned a certain eighty acres of land, composed of the southwest quarter of the northeast quarter, and the northwest quarter of the southeast quarter, of a certain section. That the New Harmony and Princeton public highway ran east and west on the north line of said land. That ever since about the year 1850, there was a road or passway, though not worked and improved as a public highway, running north

and south near to and a part of the way on the east line thereof, from said New Harmony road to a little town some distance south of said land, called Stewartsville; there had also for a similar length of time been a road or passway in an east direction from this north and south road, opposite the southern half of said eighty acres of land. Mr. Overton built his residence near the center of the southern half of said land. In the year 1868, he deeded said southern half of said land to his daughters, Rachel and her sister, the sister afterwards deeded her interest to Rachel, who is co-appellee herein with her husband (James H. Grigsby). That he continued to own the north half of said land, and live in the house upon the land deeded to his daughters until the time of his death. That he had changed the location of parts of this north and south road on said north half of said land two or three times, first in 1857, and last shortly after he had deeded the south half to his daughters; each time straightening the road as he improved the land, by placing parts of it nearer the eastern line.

Mr. Overton died in 1870, and appellant became the owner of the north half of said land by purchase from his administrator and the widow. No question is raised as to the titles to the lands.

Some four or five years after Overton's death, the eastern road and the southern end of said north and south road from the southern half of said land were both closed up and fenced across, leaving the only road as an outlet to said southern half of said land, the north part of said north and south road.

After the death of said Overton, said appellant was appointed guardian of said Rachel, and he continued to act as such. Rachel married in 1878, and, shortly after her marriage, appellant fenced up and enclosed so much of said north and south road as was on his land. Hence this suit. A demurrer was filed to the complaint, overruled, exception reserved, and an issue formed by a denial; trial by court, finding for appellees, motion for a new trial overruled, with an exception, and judgment for appellees.

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The error assigned in this court is the overruling of the motion for a new trial.

Appellant's counsel contend, that, while the complaint shows a right of way by prescription, it does not state facts sufficient to establish a right of way by necessity, and that the testimony tending to show a right of way by necessity was improperly admitted; and, as the court specially found that appellees had a right of way by necessity, the judgment below ought to be reversed.

Appellees' counsel have not favored us with a brief giving us their views and authorities; therefore, we know not what they might contend for.

So far as the special finding of the court is concerned, the record does not show that either party requested the court to make a special finding. It will therefore be disregarded, and the finding only held to be a general finding for the appellees. See section 341, 2 R. S. 1876, p. 174.

The complaint substantially states, in relation to the right of way, "that for more than thirty-five years," etc., "the said Rachel and those under whom she claims title, have continuously and uninterruptedly passed to and from her land and residence," etc., "over and upon said road and easement over the land of the defendant, under claim of right to, and as the owners of said right of way." "That during all of said time said Rachel and those under whom she claims title have had no other road or passway, or means of getting to and from the said land and residence to said public highway." Concluding by alleging that appellant had denied her the right to pass over the road, and had so fenced it as to prevent its use; and that without said easement, road or passway, her land would be of but little value, and that she would be subjected to great hardships and be deprived of the use of her land as a home.

This complaint is not based alone upon a prescriptive right by user for twenty years. Its general allegations are comprehensive enough to include the right of way derived by any of the well recognized means—by grant, prescription or neces-

sity. If defendant desired the allegations to be made more specific, he ought to have made a motion to that effect. This complaint, though less specific, substantially agrees with the several paragraphs of the complaint in the case of *Sanxay v. Hunger*, 42 Ind. 44; which was held by this court to be sufficient for a right of way by necessity. See the case of *Stewart v. Hartman*, 46 Ind. 331.

In the case of *Anderson v. Buchanan*, 8 Ind. 132, we find an endorsement of the following quotation from 3 Kent, p. 420, 424: "Thus, if a man sells land to another which is wholly surrounded by his own land, in this case the purchaser is entitled to a right of way over the other's ground to arrive at his own land."

In 2 Bouvier's Institutes, p. 190, the learned author says: "Whenever land is completely inclosed by the lands of others, so that no access can be had to the public highway, a way of necessity may be claimed," citing the following authorities: *McDonald v. Lindall*, 3 Rawle, 495; *Allen v. Kincaid*, 2 Fairf. 156; *Lawton v. Rivers*, 2 McCord, 448; *Turnbull v. Rivers*, 3 McCord, 139; *Russell v. Jackson*, 2 Pick. 576; *Jetter v. Mann*, 2 Hill, S. C. 641.

The following questions to witness were objected to by appellant:

"State what, if any, road or way there is now, or ever was from the plaintiff's, Rachel's, land to any public road, except the right of way or easement over the defendant's, Steel's, land to the New Harmony road?"

"What, if any, public road or right of way ever existed from Rachel Grigsby's land, except the way or easement over the defendant's land, to the New Harmony road?"

Under the comprehensive allegations of this complaint, as before stated, we think these questions and the answers thereto were proper. Because the allegations of a complaint are general, that is no reason why testimony applicable to them should be rejected. There was evidence tending to show that Mr. Overton, while he was building the fence on the east side of the

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north half of said eighty acres, and straightening the road so as to place parts of it nearer the east line, declared his intention to keep a road there from the house to the New Harmony road.

We think the evidence tended clearly to support the finding of the court; and there was no error in overruling the motion for a new trial. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is in all things, affirmed, at appellant's costs.

79	188
128	300
79	188
136	178

79	188
156	621
79	188
165	612

No. 8777.

WHITE ET AL. v. CLAWSON ET AL.

PARTITION.—*Complaint.*—*Title.*—*Guardian's Sale.*—A complaint for partition which is otherwise good is not bad because it avers that the defendants claim title to the plaintiff's share through a guardian's sale which was not ordered nor approved by the court.

STATUTE OF LIMITATIONS.—*Guardian's Sale.*—*Real Estate, Action to Recover.*—All actions brought to recover real estate sold by a guardian upon a judgment specially directing its sale must be brought within five years after the sale is confirmed, unless the party is under disability, and if so the action may be brought within two years after the disability is removed.

SAME.—*Infant.*—*Legal Disabilities.*—One disability can not be connected with another so as to avoid the statute of limitations. If the plaintiff is an infant when the cause of action accrues, the disability of coverture will not extend the time within which an action must be brought.

SAME.—*Title of Purchaser at Guardian's Sale.*—The title of a purchaser at a guardian's sale, who has been in possession for the requisite length of time, is protected by the statute, though the sale through which he claims is void.

From the Hancock Circuit Court.

J. A. New and C. E. Barrett, for appellants.

BEST, C.—This action was brought by the appellees against

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the appellants for the partition of forty acres of land in Hancock, and fifty-one acres in Rush county, Indiana. The complaint consisted of two paragraphs. In the first it was averred that one Robert White died intestate in the year 1848, seized of the land in question; that the appellee Elizabeth was his daughter and inherited from him an undivided one-eighth part thereof; that the appellant White owns the undivided seven-eighths of the forty acres, and appellant Parker the undivided seven-eighths of the fifty-one acres; that the parties hold as tenants in common, and prayer for partition.

The same facts were averred in the second, and the additional facts that the appellant White had procured himself to be appointed guardian of the appellee Elizabeth, by the probate court of Hancock county, Indiana, in 1850, and as such guardian had filed his petition to sell the interest of Elizabeth in said lands; that, by and under such proceedings, he sold said interest in 1850 to one Eli White, who afterward conveyed the forty acres to the appellant White, and the fifty-one acres to the appellant Parker, each of whom claims said premises through such sale; that the same was void because the appellee Elizabeth, at the time White was appointed her guardian aforesaid, had another guardian who had been lawfully appointed by the probate court of Wayne county, Indiana, where said Elizabeth then resided, and whose appointment had not been set aside, annulled or revoked, and for the further reason that the probate court of Hancock county never ordered the land sold, nor did it confirm the sale or approve the deed.

Demurrers for want of facts, filed by each appellant, were overruled to each of these paragraphs and exceptions were taken.

The appellants answered separately, White in two and Parker in three paragraphs. White's first was directed to the first paragraph of the complaint, and the second to the second. The first paragraph of Parker's answer was a general denial, and the others were directed to both paragraphs of the com-

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plaint. These paragraphs are substantially the same, and as they are unusually long we will not set them out, but will merely state the substance of them.

By these several special paragraphs the appellants admit that the appellee Elizabeth inherited one-eighth of said land from her father in 1848, but they say that the appellant White was legally appointed her guardian by the probate court of Hancock county, in 1850, where she then resided, and that during said year he made his application to said court for an order to sell her interest in said land; obtained the order, in pursuance of which he sold the land to one Eli White for its full appraised value; that said sale was reported to, approved and confirmed by the court in May, 1850, and a deed was executed to one Thomas White, the assignee of Eli, by order of the court; that said Thomas White immediately took possession of said land under such conveyance and afterward in 1851, he sold and conveyed the forty acres to the appellant White, and in 1852, the fifty-one acres to the appellant Parker, each of whom took possession of the parcel so purchased by him at the time of his purchase, and each of whom has been in the peaceable, undisturbed and adverse possession of the premises, so purchased by him, for more than twenty-five years before the commencement of this suit.

The appellees replied in two paragraphs. The first was a general denial and the other was in avoidance. In the second paragraph it was averred that appellee Elizabeth continued a minor for more than five years after such guardian's sale, and before she attained her majority she intermarried with her co-appellee, whose wife she now is and since has been. It was also averred that said guardian's sale was void in this, "that at the time of the alleged appointment of the said defendant as guardian of the plaintiff Elizabeth, one Ann White was then and there the guardian of said Elizabeth, she, the said Ann White, having been theretofore, to wit, on the 1st day of May, 1848, duly and legally appointed as such guardian

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by the judge of the probate court in and for the county of Wayne, in the State of Indiana aforesaid, where the said Ann White and Elizabeth at the time resided, and having then and there in open court duly and legally qualified as such guardian and assumed and entered upon the discharge of the duties of her trust."

Demurrers for want of facts filed by each appellant to this paragraph of the reply were overruled, and exceptions reserved.

The cause was tried by a jury and a verdict returned for the appellees; over a motion for a new trial, final judgment was rendered upon the verdict.

The appellants appeal, and, among others, assign as errors the order of the court in overruling the demurrer to each paragraph of the complaint, in overruling the demurrer to the second paragraph of the reply, and in overruling the motion for a new trial.

No objection has been suggested to the first paragraph of the complaint and we discover none.

It is insisted that the second paragraph of the complaint shows that the sale through which appellants claim title was made in pursuance of an order of the probate court of Hancock county, Indiana, and that such proceedings and order can not be collaterally impeached. In support of this position the cases of *Shroyer v. Richmond*, 16 Ohio St. 455, and *Dequindre v. Williams*, 31 Ind. 444, are relied upon. The paragraph in question is very long, its averments are somewhat contradictory, and it is difficult to determine the scope of the pleading, but we have concluded, that, fairly construed, it means that while the appellant White was appointed guardian, and filed his petition for the sale of the interest in dispute, the court never ordered it sold nor did it approve the sale made by him. If so, the title acquired through the deed of appellant, as guardian of the appellee Elizabeth, did not divest her title. The other facts were sufficient, and, as the additional facts did not control or impair the force of such other facts, we think

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the paragraph was good. For these reasons we are of opinion that the court did not err in overruling the demurrer to either paragraph of the complaint.

The ruling upon the second paragraph of the reply presents a different question. The appellants, by their answer, claim that they have been in the adverse possession of said land for more than twenty-five years before the commencement of the suit, under title derived through a sale made by the guardian of the appellee Elizabeth, which sale was ordered and confirmed by the probate court of Hancock county, Indiana, in 1850.

The statute provides that all actions for the recovery of real property sold by guardians, upon a judgment specially directing its sale, brought by a party to the judgment, must be commenced within five years after the sale is confirmed. 2 R. S. 1876, p. 122, section 211.

Any person who is under legal disabilities may bring an action within two years after the disability is removed. 2 R. S. 1876, p. 126, section 215.

The second paragraph of the reply seeks to show that the appellee Elizabeth was under disability until the commencement of the suit. This is sought to be done, however, by connecting one disability with another, and it is well settled that this can not be done. The disability must be a continuing one. *Angell Limitations*, sec. 196; *Kistler v. Hereth*, 75 Ind. 177.

The averment, therefore, that after five years from the time the sale was made the appellee Elizabeth married her co-appellee, added nothing to the reply, and as it was not averred that her infancy continued till a period within two years before the commencement of the suit, the reply was insufficient.

Nor did the averment that the guardian's sale was void add anything to it. The statute upon which the defence was based is a statute of repose, and it is not necessary that a person shall have a good title to invoke its aid. Such persons do not need it. It is only those who can not assert a good title. It protects those who hold under void sales.

Stotsenburg, Adm'r, v. Marks *et al.*, Ex'rs.

Vancleave v. Milliken, 13 Ind. 105; *Vail v. Halton*, 14 Ind. 344; *Brown v. Maher*, 68 Ind. 14; *Smith v. Bryan*, 74 Ind. 515.

The second paragraph of the reply was insufficient and the demurrer should have been sustained.

As all the questions sought to be raised by the motion for a new trial depend upon the evidence, which is not in the record, we can not consider them.

For the reasons given the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things reversed, at the appellees' costs, with instructions to sustain the demurrers to the second paragraph of the reply and for further proceedings.

79	193
132	405

No. 8488.

STOTSENBURG, ADM'R, v. MARKS ET AL., EX'RS.

CHAMPERTY.—*Maintenance*.—The distinction between maintenance and champerty is, where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but where he stipulates to receive a part of the thing in suit, he is guilty of champerty.

SAME.—*Contract*.—A contract, whereby "for value received" L. conveyed and transferred to D. all his estate in Ireland, to wit, the estate of his deceased wife, in trust that D. pay just and legal expenses incurred or to be incurred in the recovery of the estate or any part of it, pay to L. the half of the residue and appropriate to his own use the other half, is not on its face void for champerty or maintenance.

From the Washington Circuit Court.

H. Heffren, *S. B. Voyles* and *J. A. Zaring*, for appellant.

D. M. Alsbaugh and *J. C. Lawler*, for appellees.

WOODS, J.—Complaint upon a written instrument, which
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the circuit court held to be champertous and therefore void. The following is a copy of the instrument:

"For value received I hereby give, bargain, sell, convey, assign and set over to C. L. Dunham, all the estate I may be entitled to have and receive of and from the estate of my deceased wife, Sarah Loudon, deceased, formerly of Crindle, county Londonderry, Ireland, or by right of my having been the husband of said Sarah, whether the same consists in lands, tenements, hereditaments, goods, wares, moneys, or choses in action, and I hereby obligate myself, if this is not a sufficient conveyance thereof, on request of said Dunham to execute such conveyance or conveyances as may be necessary to assure to him said estate as fully as I may or can do; in trust, however, that he is first to pay all just and legal expenses that have been or may be incurred in the recovery of said estate or any part thereof, out of said estate or the proceeds thereof; secondly, he is to pay me the one equal half of the residue thereof after paying such expenses; thirdly, he is to appropriate to his own use the other half of said residue.

"In witness whereof I have hereunto set my hand and seal this 20th day of August, A. D. 1848.

"ROBERT LOUDON." [L. s.]

"In presence of, etc., J. L. MENAUGH."

It is averred in the complaint that at the time of making this agreement, or transfer, Robert Loudon resided in Washington county, Indiana, and had become invested by inheritance from his deceased wife, Sarah, with the title and right to a large estate in Londonderry, Ireland, consisting of lands, money, goods and other property, of the value of six thousand dollars; that, in the year 1858, said Robert died testate in Washington county, Indiana; that, in the year 1875, the said estate of Sarah Loudon, having been reduced to cash, was transferred to the United States and brought to Indiana, the aggregate thereof, after paying all just and legal expenses incurred in recovering the same, amounting to \$3,544.44, no part of which has ever been paid or delivered to said Dun-

Stotsenburg, Adm'r, v. Marks *et al.*, Ex'rs.

ham or to any one for him or for his estate; that, in the year 1877, Matthew Marks, the defendant's testator, as a pretended devisee and legatee of Robert Loudén, came in possession of and unlawfully retains the one-third of said sum of \$3,544.44, to wit: \$1,181.48, having obtained possession thereof without the knowledge of Dunham, and with the knowledge on his part that said conveyance had been made, and that by virtue thereof Dunham was claiming the money; that, in 1878, Dunham died intestate, the plaintiff was appointed and qualified as administrator of his estate, and made demand upon the defendants as executors of the last will of Matthew Marks for said sum.

To this complaint the court sustained a demurrer, and, the plaintiff not amending, gave judgment for the defendant.

In *Scobey v. Ross*, 13 Ind. 117, in which the definitions of champerty, given by Blackstone, Kent and others, are considered, and a number of cases on the subject reviewed, it was held that the common law and English statutes on the subject were in force here, and consequently that a contract, made in 1846, by which an attorney was to receive for his services in recovering a claim, a part of the claim or thing to be recovered, was champertous and void.

In *West v. Raymond*, 21 Ind. 305, decided at the November term, 1863, it was held that the purchase by an attorney from his client, pending the litigation, of the subject-matter of the litigation, is void; but the court expressly declined to "decide that a sale to any person of property pending litigation concerning it, would be void."

In *Lafferty v. Jelley*, 22 Ind. 471, the attorney contracted for a share of the property or estate concerning which he was employed, and the court held the agreement to be champertous, because litigation was contemplated for the recovery of the subject-matter of the contract.

The contract in *Quigley v. Thompson*, 53 Ind. 317, stipulated for the prosecution of a suit by a stranger at his own expense and constituted a clear case of illegal maintenance.

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It is also a recognized rule in this State, that "A conveyance of land, though by the rightful owner, while it is in the adverse possession of another claiming to be the owner thereof, is absolutely void as to the party in possession and his privies." *Steeple v. Downing*, 60 Ind. 478; *The German Mut. Ins. Co., etc., v. Grim*, 32 Ind. 249.

"The distinction between maintenance and champerty seems to be this: Where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but, where he stipulates to receive part of the thing in suit, he is guilty of champerty." 4 Cooley Bl. Com., p. 134, note. "A man may, however, maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity." 4 Bl. Com. 134.

It seems that the common law rule and the English statutes, under Edward I., applied to officers, attorneys and individuals alike. No one "was permitted to take upon him any business in suit in any court, or to have a part of the thing or plea in demand. Every agreement relating thereto was declared void. 4 Kent Com., 8th ed., p. 449, note a." *Scobey v. Ross*, *supra*. The assignment of choses in action even was unlawful, because an act of maintenance. According to Coke, "nothing in action, entrie or re-entrie, can be granted over; for so under colour thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed." Coke Litt. 214 a. And in *Masters v. Miller*, 4 T. R. 320, BULLER, J., says: "It is laid down in our old books that for avoiding maintenance a chose in action can not be assigned," but adds: "The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case."

In New York, it seems to be held, by reason of the adoption of the code and of some special enactments on the subject, "that not a vestige of the law of maintenance, includ-

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ing that of champerty, now remains * * except what is contained in the Revised Statutes." *Sedgwick v. Stanton*, 14 N. Y. 289; *Coughlin v. The N. Y. C., etc., R. R. Co.*, 71 N. Y. 443. See, also, note to *Orr v. Tanner*, 17 Am. Law Reg. (N. S.) 759; S. C. 12 R. I. 94.

The rule as defined by Coke, *supra*, never has prevailed in this State; and how far the subject may be affected by the Code, and the legislation of the State since 1852, it is not necessary now to consider.

Returning to the contract and complaint before us, we are of the opinion that it can not be said upon the facts stated, and from the face of the instrument itself, that the contract is champertous, or void for maintenance. It does not appear that Dunham was an attorney, contracting as such for a share in the subject-matter of a litigation which he was conducting, or agreeing to prosecute. Indeed, it does not appear that litigation was pending or anticipated. It is true that a part of the trust declared is, that Dunham is to pay out of the estate or its proceeds the "expenses that have been or may be incurred in the recovery of said estate or any part thereof," and it is insisted that the word *recover* has a technical sense, meaning, according to Bouvier, "the restoration of a former right by the solemn judgment of a court of justice." But it is not clear, nor even probable—from the facts stated in the complaint, that that is the sense in which the word was used in this contract. It does not appear that Loudon's right was disputed, or that there was any obstacle to recovering or obtaining the estate other than the difficulties of communication between Indiana and Ireland, and the necessity of taking the requisite and ordinary steps for the settlement and transfer of an estate, about which no litigation was anticipated, from the one of these countries to the other.

The judgment is reversed, with costs, and with instructions to overrule the demurrer to the complaint.

 Miller v. The State.

No. 9757.

MILLER v. THE STATE.

CRIMINAL LAW.—*Constitutional Law.—Indictment.*—The proviso in the felony act of May 31st, 1861, 2 R. S. 1876, p. 451, to the effect that, in an indictment under that act, it should not be necessary to charge the particular felony which it was the purpose or object of the persons combining to commit, is unconstitutional, against natural right and void.

SAME.—*Combination to Obtain Money by False Pretences.—Sufficiency of Indictment.*—An indictment under the act referred to, which charges the defendants with feloniously uniting and combining with each other for the purpose of committing the felony of obtaining the money of another by means of certain false pretences, and which charges facts sufficient to show that the defendants, if they had obtained such money by their false representations of alleged existing facts, would have been guilty of that particular felony, is sufficient to withstand a motion to quash. In such case, the indictment need not show that any money was obtained by means of the false pretences.

SAME.—*Question of Fact.—Indictment.*—Whether the false pretences and representations stated in such an indictment are such as would deceive any one, is a question of fact and not of law.

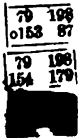
SAME.—*Demurrer to Evidence.*—A demurrer to evidence is not recognized or provided for in the criminal code of procedure and has no place in the administration of the criminal laws of this State.

From the Marion Criminal Court.

J. M. Cropsey and *C. M. Cooper*, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *J. B. Elam*, Prosecuting Attorney, for the State.

Howk, J.—In this case, the appellant and one William Morrison were jointly indicted by the grand jury of said court, at its January term, 1881. A separate trial was awarded the appellant, Miller; and, as to him, the issues joined by his plea of not guilty were submitted to a jury for trial. And the State having introduced its evidence and rested, the appellant demurred to such evidence; which demurrer was overruled by the court, and to this ruling he excepted. The jury having heard the arguments of counsel, and the instructions of the court, afterwards returned their verdict to the effect that the



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appellant was guilty as charged in the indictment, and they assessed his punishment at imprisonment in the State prison for two years, and a fine of one dollar. The appellant's motions for a new trial, and in arrest of judgment, having each been overruled, and his exception saved to each of said rulings, the court rendered judgment on the verdict.

In this court, the appellant has properly assigned, as errors, the following decisions of the criminal court :

1. In overruling his motion to quash the indictment ;
2. In overruling his demurrer to the State's evidence ;
3. In overruling his motion for a new trial ; and,
4. In overruling his motion in arrest of judgment.

The appellant has also assigned, as errors, certain other rulings of the court below, which might have constituted good causes for a new trial, if they had been assigned as such causes, in his motion for such new trial. If these other rulings were not assigned as causes for a new trial in the motion therefor, their assignment here, as errors, would present no question for the decision of this court. And if such rulings were assigned as causes for new trial, in the motion therefor, then the only proper assignment here of error would be, that the court had erred in overruling the appellant's motion for a new trial. For this assignment of error would bring before this court, for consideration and decision, every question presented by or arising under every cause for a new trial properly assigned in the appellant's motion therefor. This practice is so long and so firmly established, that it would be a work of supererogation to cite authorities in its support.

The indictment in this case charged in substance, that the appellant, Miller, and William Morrison, on the 6th day of May, 1881, at and in Marion county, Indiana, did feloniously and knowingly unite, combine, conspire, confederate and agree with each other, for the object and purpose and with the intent to obtain moneys from one Joseph Lewark, and in pursuance of said object, purpose and intent, did then and there, feloniously, knowingly, purposely, designedly, and with

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the intent to defraud the said Lewark, falsely pretend and represent to him, the said Lewark, that they, the said Miller and Morrison, were the owners of a quantity of gold bullion, in two pieces, which said bullion they had brought from the western mines and then had in their possession, which said bullion was worth \$21,000, and a little over, to wit, a fractional part of a thousand dollars over and above said twenty-one thousand dollars; that said Morrison was very anxious to sell his interest, which was a one-half interest, in said bullion, for the reason that both said Morrison and his invalid brother were greatly in need of money; that said bullion had been obtained in such a way that they did not desire any one to know that they had it, unless he be a friend; that, for this reason, they would not put it in any bank or offer it for sale in any public manner; that they had it concealed near White river, in said county by burying it in the earth, and then and there induced the said Lewark to go to the place where said bullion was said to be concealed, and he was there met by said Miller and Morrison, and one of the said pieces of metal, called gold bullion, was then and there removed from the earth and bored into, with an auger, in two places, in said Lewark's presence, and by his assistance, and the borings and particles of said metal, obtained by said boring, were then and there wrapped in a piece of paper by said Miller and Morrison, as samples of said metal, and said Lewark was assured by said Miller and Morrison, that he, the said Lewark, should have an opportunity to have said borings examined by a competent assayer, to satisfy himself that the metal was as represented by them, before he, the said Lewark, should pay for the interest of the said Morrison therein; for which said interest the said Morrison agreed and offered to take \$2,500 of the moneys of said Lewark, being current moneys of the United States, in full payment of and for his share in said piece of metal, and another piece of similar size, quality and value, which was not exhibited to said Lewark, but which said Miller and Morrison represented to said Lewark, as afore-

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said, belonged to them, and was near the same place; but instead of delivering to said Lewark the said borings and particles of metal, so obtained as aforesaid, for the purpose of having their quality and value tested, as they, the said Morrison and Miller, promised and falsely pretended to do, they, the said Miller and Morrison, then and there delivered to said Lewark certain other and different particles of metal, wrapped in another and different piece of paper, with the fraudulent intent and purpose that he, the said Lewark, should have said last-mentioned particles examined and tested, instead of the borings and particles obtained from said piece of metal as aforesaid, and said large piece of metal so removed from the earth and exhibited to said Lewark, as aforesaid, and into which said boring was done as aforesaid, was a heavy piece of metal, weighing about thirty-one pounds, oblong in shape, with smooth surfaces, and four square corners, and having the color and general appearance of gold bullion; and all of said false pretences, so made as aforesaid, were made by said Miller and Morrison, in the manner and form aforesaid, with the intent, object and purpose of obtaining then and there and thereby, feloniously, purposely and designedly, and by color and means of said false pretences, the sum of \$2,500 of the moneys of said Lewark, of the value of \$2,500, in the current moneys of the United States, by selling to him, the said Lewark, said pretended share of said Morrison in said pieces of metal, and receiving said moneys in payment therefor.

Whereas, in truth and in fact, said piece of metal so exhibited to said Lewark was not gold bullion, nor composed of gold in any form, and was not of the value of \$21,000, or of \$10,000, but was composed of almost worthless metals as compared with gold, being composed wholly of metals not precious in character, and the whole piece not being then and there of the value of five dollars; and said piece of metal was washed over with a substance of the color of gold and having the same general appearance, while within it was of a wholly different appearance, and said particles of metal, actually deliv-

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ered to said Lewark to be tested, were gold obtained by said Miller and Morrison in some other way than by boring or otherwise obtaining them from said piece of metal, and were not specimens of its character, quality or value; all of which they, the said Miller and Morrison, well knew, but did then and there feloniously and knowingly unite, combine, conspire, confederate and agree with each other to make said false pretences to said Lewark, in manner and form aforesaid, for the object and purpose of deceiving said Lewark thereby and inducing him to rely thereon, and, by reason thereof, to buy said alleged interest of said Morrison in said metal, and deliver to them, said Miller and Morrison, said money of said Lewark in payment therefor, and so obtain said money, feloniously and designedly, and by color and means of said false pretences, and by means of said union, combination and conspiracy between them, the said Miller and Morrison, contrary to the form of the statute, etc.

It is manifest from the phraseology of the indictment, in this case, that the appellant and his co-defendant, Morrison, were therein charged, or intended to be charged, with the commission of one of the felonies which are defined in "An act defining what shall constitute certain felonies, and fixing the penalties therefor," approved May 31st, 1861. This act provided as follows:

"That any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony, or any person or persons who shall knowingly unite with any other person or persons, or body, or association or combination of persons, whose object is the commission of a felony or felonies, shall be guilty of a felony, and upon conviction shall be fined in any sum not exceeding five thousand dollars, and be imprisoned in the state-prison not less than two, nor more than twenty-one years: *Provided*, That in any indictment under this section, it shall not be necessary to charge the particular felony which it was the purpose of such person or persons, or the object of each [such] person

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or persons, or body, association or combination of persons to commit." 2 R. S. 1876, p. 451.

In construing this statute, it has been uniformly held by this court, and, we think, correctly so, that the proviso therein "is in conflict with the constitution and against natural right, and hence is absolutely void." *Landringham v. The State*, 49 Ind. 186; *The State v. McKinstry*, 50 Ind. 465; *Scudder v. The State*, 62 Ind. 13.

It would seem from the language of the indictment in the case now before us, that it was intended to charge therein that the appellant and his co-defendant, Morrison, had feloniously united and combined with each other with the intent to commit the particular felony which is defined in section 27 of the felony act of June 10th, 1852. So far as applicable to this case, this section 27 provides as follows: "If any person, with intent to defraud another, shall designedly, by color of any false token * * or any false pretence, * * obtain from any person any money, * * * or thing of value; such person shall, upon conviction thereof, be imprisoned," etc. 2 R. S. 1876, p. 436.

It is earnestly insisted by the appellant's counsel that the indictment under consideration is radically defective in this, that it did not state such false representations of alleged existing facts, or such false pretences, as would or could deceive a man of common intelligence. We have a number of cases, in the reported decisions of this court, in which it has been held that it was not every false pretence on which a criminal charge might be predicated, but that such representations of alleged existing facts, as might deceive a man of common intelligence, would support an indictment for obtaining money or goods by means of false pretences. *Clifford v. The State*, 56 Ind. 245; *The State v. Snyder*, 66 Ind. 203; *Miller v. The State*, 73 Ind. 88.

It can hardly be said, however, that this question is presented in this case; for the indictment here does not charge the appellant with the felony of obtaining money by means of false pretences. The charge against the appellant is, that he and his co-defendant had feloniously united with each

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other with the intent to commit the felony of obtaining Lewark's money by means of certain false pretences. It was not charged, nor intended to be charged, in the indictment, that the felony of obtaining Lewark's money by means of the alleged false pretences had been consummated; but, on the contrary, it is fairly inferable from the indictment, that the appellant and his co-defendant did not succeed in getting any money. Besides, we may well conclude that if the particular felony had been fully consummated by the appellant and his co-defendant, they would have been indicted therefor, and not upon the charge that they had feloniously united with each other with the intent to commit such felony.

The questions presented by the alleged error of the trial court, in overruling the motion to quash the indictment, seem to us to be these: *First*. Did the indictment charge the appellant and his co-defendant, Morrison, in plain and concise language, with feloniously uniting with each other for the purpose of committing the particular felony therein mentioned? and, *secondly*. Were the facts stated in the indictment sufficient to show that, if by means of their false representations of alleged existing facts, the appellant and his co-defendant had obtained said Lewark's money, they would have been guilty of the particular felony defined in said section 27, above quoted, of the felony act of June 10th, 1852? We are of the opinion that both of these questions must be answered in the affirmative; and, therefore, it follows that the indictment was sufficient, and the appellant's motion to quash it was correctly overruled.

The appellant's counsel say that "the pretences and representations stated in the indictment are not such as would deceive any one; they were patent, frivolous and absurd, and could in no event deceive." This may be true, in fact; but, if so, it was purely a question of fact, which might very properly have been submitted to the determination of the jury. We can not say, as matter of law, however, that the pretences and representations were not such as would deceive any one; and the question can only be considered, as here presented, if

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considered at all, as a question of law. The argument of the appellant's counsel against the sufficiency of the indictment is based chiefly upon the assumption that it was bad because it did not contain the averments which would have been necessary to constitute a good indictment for obtaining money by means of false pretences. This assumption is erroneous, and, therefore, the argument is unsound.

It is also claimed by the appellant's counsel that the court erred in overruling his demurrer to the evidence. Counsel say: "The court erred in refusing to take the case from the jury, upon the defendant's demurrer to the evidence. This is a common practice in civil procedure, and there is no reason why it should not follow in the criminal practice." We are of the opinion, however, that a demurrer to the evidence has no place in the administration of the criminal laws of this State. It is not recognized or provided for in our criminal code of procedure. It is not in harmony, but, in some particulars, it is in conflict, with the authorized and established practice and usages, in the trial of criminal causes, in the courts of this State. The trial court ought not, in this case, to have entertained the appellant's demurrer to the evidence, and, indeed, it may be doubted if the court did entertain such demurrer; but, if it did, there was no error in its ruling thereon. In civil cases, the demurrer to the evidence must set out, at length and in full, the evidence in the demurrer. *Griggs v. Seeley*, 8 Ind. 264; *Lindley v. Kelley*, 42 Ind. 294; *Strough v. Gear*, 48 Ind. 100. In the case at bar, the appellant did not set out any evidence in what is called his demurrer to the evidence; so that, even if such demurrers were tolerated by, or admissible under, the criminal practice and law of this State, the appellant's demurrer would be so defective that it would present no question for the decision of this court.

The evidence is not in the record, and no other question than those decided has been presented or discussed by the appellant's counsel. We have found no error in the record.

The judgment is affirmed, at the appellant's costs.

Cooper v. The State.

No. 9969.

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CRIMINAL LAW.—Indictment.—Endorsement.—An indictment must be endorsed "A true bill" and the endorsement signed by the foreman of the grand jury, and unless so endorsed a motion to quash the indictment will be sustained; and, where the indictment copied into the record shows the lack of such endorsement, it will be regarded as a defect apparent on the face of the indictment.

SAME.—Practice.—Bill of Exceptions.—Whatever is properly a part of the record need not be made so by a bill of exceptions; and, as the endorsement forms a material part of the indictment, a bill of exceptions is not necessary to present that question.

SAME.—Counts in Indictment.—Evidence.—Record.—Verdict.—It is not necessary that all the counts of an indictment should be sustained; if the evidence fully sustains one good count, a general verdict will be sustained; *contra*, if the record affirmatively shows that the verdict is on a bad count.

SAME.—Larceny.—An offence may be charged in different ways in the indictment, to prevent defeat by variance or failure of proof. And an indictment for larceny, consisting of several counts, is not bad, because in each count a different person is named as the owner of the property.

From the Kosciusko Circuit Court.

A. G. Wood, A. Brubaker, J. H. Brubaker, C. Clemans and A. C. Clemans, for appellant.

D. P. Baldwin, Attorney General, W. W. Thornton and J. D. Widaman, Prosecuting Attorney, for the State.

ELLIOTT, C. J.—Appellant was convicted of larceny, and from the judgment entered against him prosecutes this appeal.

The indictment does not contain any endorsement by the foreman of the grand jury. The record does not show that the bill returned into court was endorsed. It is entirely silent upon this point. The statute imperatively requires that all indictments shall "be endorsed 'A true bill,'" and that this endorsement shall be signed by the foreman of the jury. R. S. 1881, section 1669. In *Johnson v. The State*, 23 Ind. 32, it was held that if the indictment was not endorsed "A true bill" and this endorsement properly subscribed, a

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motion to quash should be sustained. This ruling is in full harmony with the doctrine of the text-writers and the adjudged cases. It is in line with the decision in *Heacock v. The State*, 42 Ind. 393. The question as to the effect of a statement in the record, that the indictment was duly endorsed and signed by the foreman, is not before us, for the reasons that the record contains no such statement.

The indictment copied into the record reveals the lack of the requisite endorsement. The defect is apparent upon an inspection of the pleading. It must therefore be regarded as a defect apparent upon the face of the indictment. The term "matters appearing upon the face of the indictment" means such matters as are found within "the eight corners of the paper." The endorsement is made by statute an essential element of the indictment, and its absence is a defect for which a motion to quash will lie.

A bill of exceptions is not needed to present the question whether an indictment is or is not endorsed. The endorsement forms a material part of the indictment, and is, therefore, strictly a part of the record. If it does not appear in the transcript, then it must be presumed that none was made. We can not supply a material part of an indictment by intendment. What is properly a part of the record need not be exhibited by a bill of exceptions, nor does it need a bill of exceptions to show that an essential element of an indictment or other pleading was in fact lacking. If the pleading is in the record without such an element, it will be held that the pleading never contained the absent element.

Appellant's counsel argue that, where there are several counts in an indictment, each count must be sustained or a general verdict will be bad. This is not the law. It is not essential that all of the counts should be sustained. If the evidence fully sustains one good count, a general verdict will stand. Where, however, the record affirmatively shows that the verdict is upon a bad count, the conviction can not be sustained. *Willey v. The State*, 46 Ind. 363.

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The indictment charges the larceny in separate counts, and in each the goods stolen are alleged to be the property of different persons, or, to state the proposition more definitely, in each count a different person is named as owner. We think this was proper. An indictment may consist of several counts. The offence may be charged in different ways, in order to prevent defeat by variance or failure of proof. In *People v. Connor*, 17 Cal. 354, the objection was made that it was bad pleading to name different owners in different counts, but the court held, that the objection was without force, saying: "This is not charging different offences, but charging the same offence in different forms. The offence is the larceny of this property. The description or averment of ownership is but a mode, or a portion of the mode of describing the offence." *Cash v. The State*, 29 Tenn. 111; *State v. Tuller*, 34 Conn. 280.

Other questions are discussed, but it is not probable that they will arise upon another trial, and we do not consider them.

Judgment reversed.

No. 8920.

STRONG ET AL. v. TAYLOR SCHOOL TOWNSHIP ET AL.

FRAUDULENT CONVEYANCE.—*Joinder of Parties.—Judgment Creditors.—Practice.*—Several judgment creditors may join in an action to set aside conveyances made by their debtor to hinder, delay and defraud them.

SAME.—Decedents' Estates.—Administrator of Surety.—Bond.—Principal and Surety.—The administrator of a deceased surety on an official bond may join in an action to set aside a fraudulent conveyance of his intestate's principal without having paid any money for him.

SAME.—In such case he has an equitable right to have the property of the principal exhausted before resort is had to the estate of the surety represented by him.

SAME.—Practice.—Causes of Action.—Complaint.—Separate Paragraphs.—The fact, that a complaint seeks to set aside two or more conveyances as fraud-

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ulent, does not require that each conveyance shall be made the cause of action of a separate paragraph. They constitute but one cause of action, the fraudulent disposition of his property by the judgment debtor.

SAME.—*Venire de Novo.*—*Verdict.*—In such case, where the general verdict is for the plaintiffs and specifies the amount due each, finds that their judgments were liens on the debtor's real estate, and that his conveyances thereof were fraudulent, no ambiguity, uncertainty or repugnancy, requiring a *venire de novo*, appears.

SPECIAL VERDICT.—*General Verdict.*—*Practice.*—A specific verdict returned without the request of either party for a special verdict, or for answers to interrogatories, can be regarded as a general verdict only.

SUPREME COURT.—*Practice.*—*Demurrer.*—*Misjoinder of Causes of Action.*—*Complaint.*—*Refusal to Strike Out.*—The Supreme Court will not reverse a judgment for error in sustaining or overruling a demurrer for misjoinder of causes of action, or refusing to strike out parts of the complaint.

From the Harrison Circuit Court.

B. P. Douglass and *S. M. Stockslager*, for appellants.

L. Jordan, *W. T. Jones*, *S. J. Wright*, *W. N. Tracewell* and *R. J. Tracewell*, for appellees.

FRANKLIN, C.—Appellees, Taylor School Township and Taylor Township of Harrison County, Indiana, Daniel Flanagan, administrator of the estate of William S. Flanagan, deceased, Bella C. Kent, and Margaret Brown, administratrix of the estate of Thompson Brown, deceased, sued appellants, Thomas Strong, Sarah E. Zenor, Ellen Carter and Francis Carter, to set aside certain alleged fraudulent conveyances of real estate made by said Strong to said Sarah E. Zenor and Ellen Carter. The complaint originally embraced other parties plaintiffs, but the cause of action as to them was subsequently dismissed. The complaint as it was originally filed was in the name of the State, *ex rel.* The Trustee of the Township, and did not include the name of Flanagan's administrator. On leave of the court, over the objections of appellants, the complaint was amended by making new parties plaintiffs, and inserting the names of the School Township, Civil Township, and Flanagan, administrator of Flanagan's estate.

Appellants moved to strike out of the amended complaint

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the names of the new parties plaintiffs, and all parts of the complaint in relation to their causes of action, which was overruled by the court.

A demurrer to the amended complaint was overruled, and appellants moved that plaintiffs be required to paragraph their complaint, which was also overruled.

Appellants then moved the court to strike out of the complaint all the parts in relation to the separate deeds made to Sarah E. Zenor and Ellen Carter, which was also overruled.

Appellants then answered separately in two paragraphs: 1st, a denial; 2d, specially.

Trial by jury. Verdict for appellees.

Motion for a *venire de novo*, separate motions for a new trial, and a motion to modify the judgment, overruled, to all of which rulings proper exceptions were reserved, and alleged errors have been assigned in this court upon each of said rulings.

The first and second alleged errors may be considered together, as the objections to the amendment making new parties plaintiffs, and the motion to strike out all in relation to the amendment, present the same questions.

As to the township, this suit was commenced in the same name that a former suit upon the bond of appellant Strong, as former trustee of the township, had been prosecuted to judgment. While it was proper to prosecute that suit upon the bond in the name of the State, *ex rel.*, etc., it is not proper to prosecute this suit in that name. But the amendment did not change the real cause of action. The gist of the cause of action was to set aside certain alleged fraudulent conveyances, and not for the purpose of obtaining judgments upon plaintiffs' several claims. That had already been done. It would not affect appellants' rights whether two or ten judgment plaintiffs united in the prosecution of this action. The plaintiffs who were properly in would have better reasons for objecting to others coming in, than appellants could possibly have. But the parties themselves desiring to become plaintiffs, having a unity of interests in the objects of suit, upon

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petition, would have a right to be admitted as co-plaintiffs. And if they are admitted by the court upon the motion of the plaintiffs, we see no sufficient grounds for the objection and motions of appellants. There was no error in overruling them. In the case of *Robbins v. The Sand Creek Turnpike Co.*, 34 Ind. 461, the court quoted the following language approvingly: "Several persons having a common interest arising out of the same transaction or subject of litigation, though their interests be separate, may join in one suit for equitable relief, provided their interests be not adverse or conflicting. * * * And several judgment creditors, holding different judgments, may unite in filing a creditors' bill to reach the equitable interests and choses in action of the debtor, or to obtain the aid of the court to enforce their liens at law."

And in the case of *Powell v. Spaulding*, 3 Greene, Iowa, 443, 461, the doctrine is laid down to be, that "where there is unity in interest, as to the object to be obtained by the bill, the parties seeking redress in chancery, may join in the same complaint and maintain their action together."

The third and fourth alleged errors were the overruling of appellants' demurrers to the complaint. These demurrers were for two causes, want of sufficient facts and misjoinder of causes of action.

The objection to the complaint under the first cause is, that there is a misjoinder of parties plaintiffs as to Brown's administratrix; that in the complaint there was no cause of action shown as to her; that although Brown had been one of the sureties for Strong, on his bond as trustee, and for Strong's default as such trustee a claim had been allowed against Brown's estate for \$4,317.68, yet she had paid nothing on said claim, and as the representative of such surety she could not bring an action until she had paid something. It may be somewhat questionable in this class of cases, whether the demurrer in this form properly raises this question. In Story's Equity Pleading, section 509, it is said that a demurrer reaches too many parties plaintiffs. In the case of *Berk-*

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shire v. Shultz, 25 Ind. 523, it was held that the fourth statutory cause for demurrer, a defect of parties, plaintiff or defendant, only applies to too few parties; and, where there are too many defendants, the ones against whom no cause of action is shown can take advantage of it by demurring separately for that cause. But if there are too many plaintiffs, that objection can be raised by demurring generally for the fifth cause, the want of sufficient facts, without making a specific application of it to the plaintiff in whom no cause of action is shown to exist, and the remedy is to strike his name out of the complaint, or amend so as to show a cause of action in him. So, whatever reasons might exist for making the rule applicable to too many plaintiffs, similar to the one adopted for too many defendants, it appears to be otherwise settled by this court. But we think the rule thus adopted should not be made to extend beyond that class of cases where the plaintiffs jointly sue upon a joint cause of action, and in this class of cases, where the plaintiffs jointly sue upon separate causes of action, having a unity of interests in the object or purpose of the suit, those who have a good cause of action ought to be permitted to prosecute their suit without being subjected to a demurrer for the want of sufficient facts. Be this as it may, let us see whether the facts alleged are sufficient for the administratrix to maintain this suit. As the representative of the surety she could not maintain an action against the principal for the recovery of money, unless some had been paid for him. But she was not seeking to recover money in this case; she was only seeking to make the property of the principal pay his debts, for a part of which she, as such representative, stood liable. She had an equitable right to have the property of the principal exhausted before resort was had to the estate of the surety, which she represented.

In the case of *Gunel v. Cue*, 72 Ind. 34, this court held that a surety holding an indemnifying mortgage, after the maturity of the debt, if the mortgage contained a stipulation for the mortgagor to pay the money, could foreclose the mortgage

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without having paid anything, and could recover damages for probable loss.

We think there are strong equitable reasons why this administratrix should have the right to make the principal's property pay his indebtedness, in order to save the estate harmless which she represented. But without deciding this question, if the overruling of this demurrer for this cause was error, it was a harmless one, for the jury made no finding as to this plaintiff; there was no evidence in the case in relation to her cause of action, and the court gave no judgment in relation to her. Appellants were not injured by her having been made a plaintiff.

As to the other cause of demurrer, a misjoinder of causes of action, we think there was no misjoinder of causes of action. Story in his Equity Pleadings, section 286, says: "In such a case (it is said) the fraud equally affects all the plaintiffs, and they may jointly sue; and all the defendants are implicated in it in different degrees and proportions, and therefore are properly liable to be jointly sued." See also section 537. But the 52d section of the code provides, that "No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." And the same has been the ruling of this court. See the cases of *Marsh v. Edwards*, 11 Ind. 129; *President, etc., v. Brinkmeyer*, 12 Ind. 349; *Burrows v. Holderman*, 31 Ind. 412; *Clark v. Lineberger*, 44 Ind. 223.

But this question being clearly settled by the statute, it is unnecessary to discuss it further. There was no available error in overruling the demurrer to the complaint.

The fifth alleged error is the overruling of appellants' motions to paragraph the complaint, so as to set out each one of the alleged conveyances in a separate paragraph.

There were two separate conveyances made on the same day, May 15th, 1876, to Sarah E. Zenor and Ellen Carter, conveying to each an undivided half of the same property; and one conveyance July 28th, 1876, to them jointly for another

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portion of real estate. These conveyances all constitute one cause of action, the fraudulent disposition of his property by the judgment debtor. They each constitute a part of the general purpose and action to hinder, delay and defraud creditors. See authorities heretofore referred to upon the ruling on the demurrer.

There was no error in overruling the motion to paragraph the complaint.

The sixth and seventh errors assigned are, the overruling of the separate motions of Mrs. Zenor and Carter to strike out of the complaint all in relation to the separate deeds made to them, for the reason that neither of them constituted a joint cause of action against both of them.

We think these two deeds constituted but one transaction, and made a joint cause of action against both of said appellants. And this court has repeatedly held that a judgment will not be reversed for the refusal of the court below to strike out parts of the complaint. *The City of Greencastle v. Martin*, 74 Ind. 449; *Hon v. Hon*, 70 Ind. 135; *Brinkmeyer v. Helbling*, 57 Ind. 435.

The eighth alleged error is the overruling of the separate motions for a *venire de novo*.

Appellants object to the overruling of these motions for the following reasons: That the verdict of the jury does not find that the deeds were made with intent to hinder, delay or defraud Strong's creditors, or appellees; that they were without consideration; that appellants had notice of the fraudulent intent of the grantor; and does not find for or against appellants on the second paragraphs of their answers.

The verdict of the jury is as follows:

"We, the jury, find for the plaintiffs; that Taylor School Township has a judgment against Thomas Strong, defendant, for the sum of \$3,817.83, rendered by the Harrison Circuit Court on the 13th day of June, 1877; that Taylor Township has a judgment against said defendant Thomas Strong, rendered by the same court at the same time, for the sum of

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\$436.18; that Bella C. Kent has a judgment rendered by said Harrison Circuit Court against said defendant Thomas Strong, on the 15th day of March, 1877, for the sum of \$662.93; that William S. Flanagan has two judgments rendered by the said Harrison Circuit Court against said defendant Thomas Strong, on the 4th day of September, 1877; that since the rendition of said judgments the said William S. Flanagan has departed this life, and that the plaintiff Daniel Flanagan, administrator of the estate of the said William S. Flanagan, was duly appointed his administrator, said judgments, when rendered, being for the sum of \$1,145 and \$100.70, respectively; that the judgments rendered above, in favor of plaintiffs and against said defendant Thomas Strong, are liens, and were from the date of their rendition, on the real estate mentioned and described in plaintiffs' complaint; and that the deeds of conveyance mentioned in said complaint, made by the said Thomas Strong to the said Ellen Carter, Sarah E. Zenor, and Sarah E. Zenor and Ellen Carter are fraudulent and void as against the said plaintiffs named as aforesaid, and ought to be set aside."

There was no request made that the jury should return a special verdict, and no interrogatories asked for the jury to answer, in the event they returned a general verdict. And, while the verdict may be more specific than necessary, it can only be regarded as a general finding in favor of the plaintiffs named in the verdict.

If appellants desired a more specific finding, they could have requested a special verdict or asked interrogatories to be answered should they return a special verdict. Appellants, not having taken either of these steps, do not occupy a position to be favorably heard in their complaints as stated in their motions.

We see no ambiguity, uncertainty or repugnancy in the verdict, that would prevent the court from rendering the proper judgment upon it, or rendering it necessary that a *venire de novo* should have been granted. There was no error in overruling these motions.

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Appellants' counsel next present the twelfth specification in the assignment of errors, which is, that the court erred in overruling their motions to modify the judgment so as not to render any judgment against appellants Ellen Zenor and Sarah E. Carter as to the said first two deeds. These two deeds covered the most valuable portions of the property, worth some \$14,000; and if the motion had been sustained there would have been left only about \$600 worth of Strong's property with which to pay his indebtedness to plaintiffs.

We see no good reasons why the court ought to have sustained said motions. There was no error in overruling them.

The remaining errors complained of were the overruling of appellants' joint and separate motions for a new trial.

The first reason for a new trial is waived by the instructions not being in the record.

The second, third and fourth reasons embrace questions that have heretofore been disposed of upon the rulings on the motions and pleadings.

The remaining reasons for a new trial were in relation to the evidence not supporting the verdict.

We have examined the testimony carefully, and while it shows some strong equitable reasons why Mr. Strong should have done something for his daughters, we do not think it justified him in conveying nearly all of his real estate to them without leaving property enough to pay his indebtedness.

The daughter, Sarah, had lived upon the farm some twenty years; she and her husband had worked upon the farm for that length of time, had raised and educated a family of six children, and built a house out of and with the proceeds of the farm. The daughter, Ellen, had lived with the father on the farm for some years after the death of her husband, and the father had had the use of some \$1,100 of her money that she had received from her husband's estate. The daughters testified that their father had some years before promised to deed the farm to them.

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The evidence further shows that about a week before the said first two deeds were made, without the knowledge of the daughters, the father caused to be conveyed to them, valuable mill property in the State of Kentucky, that had been sold at a sheriff's sale for over \$1,700; that, without any agreement or contract with the daughters in relation to the subject, he deeded the home farm to them as contained in the first two named deeds, for the nominal consideration of \$11,000; that he made the last named deed to them for the remainder of his real estate in that county, without their knowing anything about it; that he also transferred to them some choses in action, value not shown; that at the time these conveyances and transfers were made the plaintiffs' said indebtedness existed, amounting to over \$6,000; that at said time he owned, in addition to the property so conveyed and transferred, two houses in New Albany, Ind., one worth some \$3,500, with a mortgage upon it of \$1,200, the other worth about \$1,000.

We think this evidence justified the jury in finding that it was the intention of Strong to cheat, hinder, delay and defraud his creditors. And it is not reasonable to suppose that his daughters, under the circumstances, were entirely ignorant of the facts, and the testimony tends strongly to prove that the conveyances were voluntary and without consideration.

The evidence supports the verdict of the jury; and the verdict is not contrary to law. There was no error in overruling the motions for a new trial.

We find no available error in this record. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

Newman v. Manning.

No. 8564.

NEWMAN v. MANNING.

PROMISSORY NOTE.—Assignment.—Payment.—Judgment.—Notice.—Garnishee.
—Suit on a promissory note by the assignee against the maker. Answer, that before notice of the assignment the defendant had paid the note by paying a judgment regularly rendered against him as garnishee in a suit against the payee. Reply, that before payment of the judgment the defendant had notice of the assignment; that he had executed to the payee another note of \$600, which the payee held after the assignment of the note in suit; and praying that so much of the payments made as garnishee as would satisfy that note be applied thereon, and that only the balance of such payments, if any, be applied on the note in suit.
Held, that the reply was bad on demurrer.

From the Hendricks Circuit Court.

C. C. Nave, for appellant.

L. M. Campbell, for appellee.

NIBLACK, J.—On the 20th day of August, 1874, the appellant, Clinton V. Newman, executed his promissory note to one James A. Hurst, for the sum of \$800, payable on the 25th day of December, 1875. Afterwards, and before maturity, this note was assigned by Hurst to the firm of Patrick & Manning, and this was an action by Charles H. Manning, as surviving partner of that firm, against Newman, on the note.

The defendant answered in three paragraphs:

1. That the defendant had, before notice of the assignment of the note, fully paid the same by the payment and discharge of certain judgments taken against him as garnishee in attachment proceedings against Hurst, in the Hendricks Circuit Court, and before certain justices of the peace of Hendricks county.

2. Setting up substantially the same defence as in the first paragraph, but in a different form and more in detail.

3. Averring that the note was given for a tract of land purchased of Hurst; that at the time of the purchase the sum of \$37 stood as a lien against the land for unpaid taxes, which

the defendant had paid, and setting up that amount as a set-off against the note; also averring payment of the residue of the note by the discharge of certain judgments against him as garnishee, as set forth in the first paragraph.

The plaintiff replied:

1. In general denial.

2. That, at the time of the execution of the note sued on, the defendant also executed a certain other note to Hurst for the sum of \$600, payable on the 25th day of December, 1876; that the defendant had notice of the assignment of the note in suit before he made any payment thereon, either as garnishee or otherwise; concluding with a demand that, if the court should adjudge the alleged payments by the defendant as garnishee to have been made upon proper legal compulsion, so much of such payments as were necessary for that purpose should be applied to, and set off on, the \$600 note which Hurst continued to hold after the assignment of the \$800 note to the plaintiff, and that only the overplus of such payments, if any, should be applied upon, and deducted from, the note held by the plaintiff.

The defendant demurred to this second paragraph of the reply, but his demurrer was overruled.

There was a verdict for the plaintiff, and, over a motion for a new trial, judgment was rendered against the defendant upon the verdict.

The first question is made upon the sufficiency of the second paragraph of the reply.

That paragraph was framed upon what appears to have been the theory that, if the defendant received notice of the assignment of the note in litigation to Patrick & Manning, at any time before he paid the judgments rendered against him as garnishee, he was not entitled to have the amounts paid on such judgments applied as payments on the note. Such a theory is not sustained by the authorities.

On the contrary, notice of the assignment, in cases like this, to be effectual against judgments against the maker of the

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note, as garnishee, under proceedings in attachment against the payee, must have been given before such judgments against the maker were rendered. *Sharts v. Awalt*, 73 Ind. 304; *Daggett v. Flanagan*, 78 Ind. 253.

A person, against whom a judgment as garnishee, under attachment proceedings, has been rendered, is as much bound to pay the judgment, so rendered, as he would be to pay any other judgment ordinarily rendered against him for the recovery of money. Any notice therefore, purporting to require him to disregard such a judgment, after it has been rendered against him, is necessarily ineffectual.

The materiality of the decision upon the demurrer to the second paragraph of the reply was made obvious by the subsequent proceedings, as the cause was tried on the theory upon which that paragraph was framed, that is, if notice of the assignment of the note was given to the defendant before he paid the judgments against him as garnishee, he was not entitled to have the amounts paid by him on such judgments applied as payments on the note.

It appeared, amongst other things, from the evidence, that certain proceedings in attachment, instituted in the Hendricks Circuit Court, in which one Pearson and three others were plaintiffs, and Hurst was defendant, and in which the defendant was summoned as garnishee, came on to be heard on the 17th day of June, 1875; that the defendant admitted upon his examination at the trial, that he was indebted to Hurst in a balance of \$760 on the \$800 note, and in the sum of \$600 on the note for that amount; that the court, upon such hearing, on that day, rendered judgments in attachment for an aggregate sum near \$550 and costs of suit, and against the defendant for the balance due from him on the \$800 note, ordering him to pay that sum into court when that note should become due, and in default that execution should issue against the defendant's property; also ordering the defendant, in case the amount due upon the \$800 note should not be sufficient to

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pay the judgments in attachment and costs, to pay into court a sum sufficient, out of the amount to become due on the \$600 note, to pay the residue which might remain due on such judgments and costs. There was also evidence tending to show that the first notice which the defendant had of the assignment of the \$800 note to Patrick & Manning was communicated to him on the 20th day of June, 1875, three days after the judgments in attachment were rendered.

The court, amongst others, gave the jury the following instruction :

“If the defendant was garnisheed by Pearson and Fellows to answer as to his indebtedness to James A. Hurst, and answered that he owed Hurst on two notes of \$800 and \$600, respectively, and if in fact, at the time, the \$800 note was assigned to plaintiff, of which the defendant received notice about the 20th of June, 1875, and before he made any payment, and if he then voluntarily paid the amount for which he was garnisheed by Pearson and Fellows, and took no steps to notify the plaintiff or to protect himself, knowing that the \$800 note was assigned, and the \$600 note was then still in the hands of Hurst, he made such payments at his own risk, and the amounts so paid should be first applied to the discharge of the \$600 note, and only the excess, if any, allowed by the jury as a payment on the note sued on.”

This instruction was palpably erroneous :

First. Because of the construction put upon the notice of the assignment of the note in evidence at the trial.

Secondly. Because of the announcement that the amounts paid by the defendant, as garnishee, should be first applied in discharge of the \$600 note.

As is above shown, the Hendricks Circuit Court had, as a part of its judgment in the attachment proceedings, ordered the amount to become due on the \$800 note to be first paid into court and applied to the several sums found to be due the attaching creditors. The instruction was, therefore, in oppo-

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sition to what had been previously adjudicated by the same court in an appropriate proceeding.

The defendant did not reserve a formal exception to this instruction, but as the cause will have to be remanded for further proceedings, to result probably in another trial, we have deemed it best to set out the instruction and to express an opinion upon it.

For the error in overruling the demurrer to the second paragraph of the reply, the judgment will have to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 8962.

MENNET, ADM'X, ET AL. v. GRISARD.

EVIDENCE.—*Promissory Note.*—*Principal and Surety.*—*Alteration of Endorsement.*—*Extension of Time.*—*Release.*—On trial of an action upon a promissory note, the plaintiff read in evidence the note and an endorsement: "Received October 15th, 1878, forty dollars on the within. F. L. G." The defendant, to sustain an answer of suretyship and release by an extension of time given to the principal, was entitled to give in evidence that part of a conversation between the plaintiff and a competent witness, in which the plaintiff read to him and he himself read the same endorsement, with the added words, "interest to February 23d, 1879."

SAME.—*Possession of Written Instrument.*—*Endorsements.*—*Presumption.*—One who owns and has possession of a written instrument is presumed to know its contents and to have made its endorsements, and to know their force and effect.

From the Switzerland Circuit Court.

L. O. Schroeder, W. D. Ward and T. Livings, for appellants.
W. R. Johnson and F. M. Griffith, for appellee.

ELLIOTT, C. J.—The issue upon which this case was tried is

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that joined upon appellant's answer alleging that her intestate was surety on the note in suit, and that he was released by the extension of the time of payment granted to the principal.

The appellant proved by a witness introduced by her, that he had a conversation with the appellee; that the latter read to him the endorsement on the note, and that the witness himself read the endorsement, and thereupon appellant offered to prove by the witness that he examined the endorsement and that it read: "Received October 15th, 1878, forty dollars on the within, interest to February 23d, 1879;" and that the endorsement had been altered so as to make it read: "Received October 15th, 1878, forty dollars on the within. F. L. G." The court refused to permit the introduction of this evidence.

The exclusion of this testimony was erroneous. The appellant had a right to show the contract between the principal in the note and the appellee, and the endorsement as originally written on the note would have tended to sustain her claim that there was such a contract, and would also have shown its character.

Appellee insists that it was not shown that the endorsement was made by him, nor by any one acting under his authority. The note was in his possession, it was introduced by him in evidence, and the presumption is that he made or directed the making of all endorsements found upon it. One who has possession of an instrument, of which he is the owner, is presumed to know its contents and to know the force and effect of all endorsements. Where the instrument is in the possession of the party, it is not necessary to prove that endorsements upon it were made by him, for the legal presumption supplies this evidence. *Brown v. Gooden*, 16 Ind. 444.

Judgment reversed.

McCabe v. Britton et al.

No. 6192.

McCABE v. BRITTON ET AL.

DIVORCE.—Wife's Attorneys.—Agreement Concerning Allowance for Attorney's Fees.—If, during the progress of an action for divorce, an attorney is employed to assist the attorneys already engaged on behalf of the wife, upon an express agreement with the wife and such attorneys that he shall look to the client for his compensation, out of the alimony allowed her if she succeeded, and that the attorneys first employed shall have the allowance for attorney's fees to be made by the court in the case, the agreement as between the attorneys is binding.

SAME.—Contract of Married Woman.—The promise of a married woman defending an action for divorce, to pay an attorney's fee, is not binding; nor is her agreement before divorce, that the attorney may have a lien on her judgment for alimony. *Putnam v. Tennyson*, 50 Ind. 456, distinguished.

SAME.—Alimony.—Lien of Attorney.—Statute Construed.—The effect of the 17th section of the act regulating the granting of divorces is that no liens for attorney's fees can be taken on a judgment for alimony, over and above the amount of the allowance, if one is made by the court for the wife's reasonable expenses in the case.

SAME.—Allowance Includes Attorney's Fees.—The allowance made by the court for the wife's reasonable expenses, in an action for divorce, includes her attorneys' fees and is conclusive upon the parties, including the attorneys interested, as to what is a reasonable allowance.

SAME.—Contract.—Attorney's Fees.—Alimony.—If, during the progress of the trial of a divorce suit, the attorneys for the wife agree among themselves and with her, that two of the attorneys shall have whatever allowance may be made by the court for the fees of her attorneys, and the third shall be paid by her a sum named out of the alimony awarded, and they accordingly afterwards enter liens, the two upon the allowance for attorneys, and the third upon the decree for alimony, and the judgment is afterwards compromised and receipted in full, the two attorneys entering the discharge of record, and receiving for their own use the entire amount of the court's allowance for fees, the third has no claim upon them for any part thereof; and the fact, that the agreement between the attorneys was kept from the knowledge of the court, is immaterial, the parties in that respect being *in pari delicto*.

SAME.—Attorney's Lien for Fees.—Discharge.—The lien of an attorney for his fees, if validly entered, can not be discharged without his authority, by any act of the judgment plaintiff.

From the Montgomery Circuit Court.

McCabe v. Britton *et al.*

J. McCabe, for appellant.

P. S. Kennedy, W. T. Brush, W. P. Britton, M. W. Bruner
and *G. W. Paul*, for appellees.

WOODS, J.—The appellant brought the action, alleging in his complaint substantially the following facts, to wit: That the defendant Samuel G. Irwin, at the February term, 1875, of the Montgomery Circuit Court, had made application for a divorce from his wife, the defendant Mary J. Irwin; that Mrs. Irwin employed the defendants William P. Britton and Melville W. Bruner, who were attorneys and counsellors at law and partners in the practice, to defend the suit and to present a cross bill, praying, for her, a divorce, alimony and the custody of her children; that afterwards, and pending the suit, Britton and Bruner, representing that they had authority from Mrs. Irwin so to do, requested the plaintiff, who was then a practicing attorney at law, to assist them in the defence of the action and in the prosecution of the cross bill; and, relying on said representation, the plaintiff engaged actively, and gave his assistance in the case, which on account of the social standing of the parties, and the magnitude of the interests involved, was important; that during the progress of the trial, at the urgent instance of Britton and Bruner, it was agreed between Mrs. Irwin and the plaintiff that the plaintiff should receive one hundred and fifty dollars for his services; that his services were worth at least two hundred and fifty dollars; that the defendant obtained, upon her cross bill, a decree of divorce, and for the custody of some of her children, and a judgment for about \$7,000 alimony; that, at the inception of the cause, upon an order of the court, the plaintiff paid over to Britton and Bruner, to enable the defendant to make her defence, two hundred dollars, which they kept; and, on the final decree, the court, among other things, made an order allowing to the defendant's attorneys, without specifying them or either of them by name, five hundred

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dollars for services in the cause, for which judgment was then and there rendered in their favor against Samuel G. Irwin, without specifying the names of any of them; that while the court was still in session, at the term when the judgment for alimony was rendered, this plaintiff filed a written notice, duly signed by him and attested by the clerk of the court, that he held a lien on the judgment and decree for his fee for his services as attorney of the defendant, in the sum of one hundred and fifty dollars, which writing was entered on the margin of the order book where the judgment for alimony and allowance of \$500 for attorneys' fees were recorded; that afterwards said Samuel G. Irwin paid into the clerk's office and to the clerk of the court the said sum of \$500, and afterwards Britton and Bruner, without the knowledge and consent of the plaintiff, received and receipted for said sum upon the record; that, after the filing of the plaintiff's claim for a lien, Samuel G. Irwin conveyed to Mrs. Irwin a tract of land, in said county, in full satisfaction of all of said decree; and Britton and Bruner, as her attorneys, entered of record a receipt for \$5,000, in full of the decree, signing their firm name as attorneys for the defendant, Mrs. Irwin, who is now claiming that said decree is fully satisfied, and is not a lien upon the land so conveyed to her; that Britton and Bruner have received the money out of which the plaintiff's fee should have been paid, and are claiming to be entitled to the entire sum so received by them, and that the plaintiff still has a lien upon said judgment which can be enforced either against the land conveyed to Mrs. Irwin, or against the other property of Samuel G. Irwin, all of which he stoutly denies.

Wherefore the plaintiff makes them all parties, etc., demands judgment against them all for \$250, for the proper enforcement of his lien and other proper relief.

The defendants Irwin each filed a demurrer to the complaint for want of facts, which the court sustained and gave judgment in their favor.

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Britton and Bruner, having excepted to the overruling of their demurrer to the complaint, answered by a general denial and by a special plea to the effect, that the plaintiff joined with them in the defence of said suit upon an express agreement between the plaintiff, Mrs. Irwin and them, that they, Britton and Bruner, should have for their services whatever sum or sums the court should order Samuel G. Irwin to pay into court to enable Mrs. Irwin to prosecute her defence, and for attorneys' fees, and that the plaintiff would look to Mrs. Irwin for his compensation, in case she should succeed in the action; that she did succeed; that said attorneys' fee was paid to them in accordance with said contract, without any objection on the part of the plaintiff or of Mrs. Irwin; that the said fee was \$500, was recovered by Mrs. Irwin in her said suit, and was for her attorneys in the cause as their fees; that they relied on said agreement, and in such reliance gave their services in the cause, and afterwards receipted to the clerk for said fee in pursuance of said agreement which was fully executed by the plaintiff and defendants; and the plaintiff, being bound to look to Mrs. Irwin alone for his compensation, then and there relinquished to them all claim which he might have had on said fee, in case of Mrs. Irwin's success in the suit. Wherefore, etc.

The court having overruled his demurrer to this answer, the appellant replied in two paragraphs:

First. That the said agreement was made after the trial had progressed nearly to its close, and prior to the finding of the court and to the allowance of said sum of \$500, and while Mrs. Irwin was still a married woman; and that, after the reception of said money, the defendants promised to pay the plaintiff \$150 of it, if he failed to get it of Mrs. Irwin.

Second. That said agreement was made after the trial had progressed nearly to its close and before the allowance of said \$500, which the court made and intended for full compensation for all of the attorneys of the defendant, the court being kept in ignorance of the agreement aforesaid; that the agree-

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ment was made while Mrs. Irwin was a married woman, and said money was paid to the clerk and receipted for by Britton and Bruner without any further assent from her or the plaintiff, and without her consent after she was divorced, and there was no other consideration for plaintiff's agreement than the said agreement of Mrs. Irwin, which she refused to carry out, and never has performed.

The appellees Britton and Bruner demurred to each paragraph of the reply, and saved exceptions to the adverse rulings of the court thereon, but have not assigned cross errors.

The appellant has assigned error upon the rulings of the court in sustaining the respective demurrers of the defendants Irwin to the complaint, in overruling his demurrer to the special answer of Britton and Bruner, and in overruling his motion for a new trial.

Assuming, without deciding, that the complaint shows a cause of action in favor of the plaintiff against Britton and Bruner, it is clear that the special paragraph of answer shows a good defence.

It shows that Britton and Bruner had been first employed to conduct the defence of Mrs. Irwin and to prosecute her cross bill, and that the plaintiff joined them, upon the express agreement with them and her that they should have whatever allowances the court should make for attorneys in the case, and that the plaintiff should look to Mrs. Irwin for compensation out of the alimony which should be awarded her in case she succeeded.

It was competent for the parties to make this agreement, notwithstanding Mrs. Irwin was yet under the disabilities of coverture. She could not bind herself personally to pay attorney's fees. *Pierce v. Osman*, *post*, p. 259. But nevertheless she had the right to engage attorneys to represent her, who should be entitled to receive such fee or compensation as the court should order the husband to pay, and, perhaps in case no such order of the court had been made, but alimony had been awarded, would have had the right to

claim an attorney's lien thereon for a reasonable compensation. *Putnam v. Tennyson*, 50 Ind. 456. And if the appellant saw fit, as it is averred he did, to come into the case upon the understanding and agreement with the other attorneys, who had theretofore been employed and were conducting it, that they should have all allowances made by the court for the defendant's attorneys, and they afterwards proceeded upon that understanding, and obtained the sum so allowed, we do not perceive upon what grounds the plaintiff can have an action against them for a part of the allowance. If, in the transaction as stated, Mrs. Irwin's agreement was void, and there was no consideration for the plaintiff's promise to look to her for his compensation, then his contract was to do voluntary service, taking the chance of such voluntary compensation as she might give him. He had the right to make such a contract; was bound to know the law; and if he chose to come into the case, under an agreement which was equivalent to an agreement to work without compensation, relying on a promise which he knew could not be enforced, he can not, on account of the non-fulfilment of that promise, acquire a claim upon the fund, which, by his own agreement, others were to have as a compensation for their services rendered and to be rendered in the case. Instead of there being any duty or promise, express or implied, on the part of Britton and Bruner to pay the plaintiff any part of the sum which they had received, they had his express promise, made upon his joining them in the case, that they should have the money in dispute for their own use.

The special answer is not avoided by the facts stated in either paragraph of the reply. In the first paragraph is the allegation, that, after Britton and Bruner had received and receipted to the clerk for the money in question, they promised to pay the plaintiff a part of it; but this is a departure from the complaint, which alleges no such promise, and is predicated entirely upon a supposed duty or implied promise arising from the facts alleged.

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It is also alleged that the agreement set up in the answer was kept from the court, and that the court intended the sum of \$500, allowed as attorneys' fees, to be in full for the services of Britton and Bruner, and the plaintiff; but if there was any wrong in withholding from the court a knowledge of the agreement which had been made, the parties would seem to have been *in pari delicto*, in this respect; and, if thereby Britton and Bruner obtained a larger compensation than otherwise the court would have ordered, the plaintiff is not for that reason entitled to claim any part of it.

The averment that Britton and Bruner entered satisfaction of the judgment for alimony is immaterial. If the plaintiff had acquired a valid lien upon the judgment, his right to collect the amount for which he had secured a lien, by execution upon the judgment, was not affected by the satisfaction; and, if his lien was not valid, he clearly has no ground for complaint on account of the discharge of the decree.

The averment that the alleged agreement was not made until near the close of the trial, and while Mrs. Irwin was still under coverture, is not inconsistent with the allegation of the answer, which is not denied, that the plaintiff accepted employment in the case—*joined* in the defence—under the terms of that contract.

It therefore stands admitted upon the pleadings, that when he came into the case the plaintiff agreed with Britton and Bruner, that they should have such allowances as the court should make for their client's attorneys, and, this being so, they were entitled, upon the pleadings, to the judgment which was rendered in their favor. 2 R. S. 1876, p. 186, sec. 372. And it is unnecessary to consider whether upon the evidence, irrespective of the pleadings, a different result might be reached. The facts admitted in the pleadings can not be disputed on the trial.

It is proper to observe, however, that it is not averred in the complaint, that the appellant took, or attempted to take, a lien upon the sum allowed by the court for attorneys' fees. The complaint is not explicit in this respect. The proof, how-

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ever, is direct and undisputed, that the appellant attempted to obtain a lien upon the decree for alimony only, while Britton and Bruner, at the same time, took a lien upon, and for the entire amount of, the allowance for attorneys. Conceding, therefore, that the agreement between counsel was made after the appellant had come into the case, and was without consideration, it is difficult to perceive on what legal ground he can claim to recover of the appellants money which he had so agreed that they should have, and had entered of record an implied, if not an explicit, consent to their receiving. Upon the payment of the money by the clerk to Britton and Bruner, if not upon the taking of the liens, it became an executed agreement, and there is no more ground for recovering the money than there would be for reclaiming a gift.

It remains to consider whether the court erred in sustaining the demurrers of the defendant Irwin to the complaint; and this leads to the inquiry whether the plaintiff acquired a valid lien for his fee upon the decree for alimony.

Two reasons are urged against the validity of the lien asserted in the complaint: *first*, that it was not taken in time; and, *second*, that the court having made an allowance for the fees of the attorneys of Mrs. Irwin, it was not competent for them, or any of them, to claim a lien beyond the sum allowed by the court.

The latter objection seems to be well taken; and the first, therefore, need not be considered.

It has been decided in a number of cases, and is no longer the subject of dispute, that, while a wife may employ attorneys to prosecute or defend for her in an action for divorce, she is not able to bind herself or her property to pay for the service of such attorney. *Pierce v. Osman*, *supra*. In *Putnam v. Tennyson*, 50 Ind. 456, it seems to have been held, that, if a judgment for alimony is obtained, the attorney may enter a lien upon the judgment; and, if she afterwards assents to the amount so claimed, it becomes a valid lien.

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The complaint in this case shows that there was no such subsequent assent upon the part of Mrs. Irwin; and more important than this, perhaps, is the fact that the court made a specific allowance and order against the husband for the fees of the wife's attorneys. This having been done, we are of the opinion that it was not competent for her attorneys or any of them to enter a lien for fees beyond the amount fixed by the court and ordered to be paid for that purpose by the husband.

The 17th section of the act regulating the granting of divorces provides, that, "on decreeing a divorce in favor of the wife or refusing one on the application of the husband, the court shall, by order, to be enforced by attachment, require the husband to pay all reasonable expenses of the wife in the prosecution or defence of the petition when such divorce has been granted or refused." 2 R. S. 1876, p. 329.

The power and duty is imposed on the court, in each case within the scope of this provision, to determine and adjudge against the husband all the wife's reasonable expenses in the case. This includes her attorneys' fees, and when the court has determined the reasonable amount thereof, the determination is conclusive on all concerned, parties and attorneys. See *Husband v. Husband*, 67 Ind. 583. The sum so allowed having been determined to be the fair and reasonable fee, there is no ground left for claiming a further sum as a lien upon the decree for alimony. The only basis for claiming such a lien, if it can be claimed at all under the statute, in the absence of a binding contract, is, that it is just and reasonable; and, when the court has already determined and allowed what is just and reasonable in the particular case, the entering of a lien for more is necessarily unjust and unreasonable, and therefore not permissible.

Judgment affirmed, with costs.

Williamson v. Hitner.

No. 8839.

WILLIAMSON v. HITNER.

CONTRACT.—*Assignment of Tax Certificate.*—*Pleading.*—*Mistake of Law.*—The complaint averred a purchase by the defendant of land at a tax sale and the receipt by him of a proper certificate of purchase, which he sold and delivered to W., and agreed to transfer to him by valid assignment; that an assignment was written but never acknowledged; that W. received a tax deed upon it, and then conveyed to the plaintiff, who, finding the tax sale to be a nullity, desires to apply to the county board to refund the purchase-money, but is prevented by the defective assignment, and that the defendant refuses to acknowledge the assignment. *Held*, that the complaint is bad on demurrer, the mistake being one of law as to the legal effect of a written instrument.

SAME.—Where a party gets all he knowingly contracts for, no action lies, although that which he gets turns out to be of much less value than he supposed it to possess.

From the Spencer Circuit Court.

C. H. Mason, for appellant.

C. L. Wedding, for appellee.

ELLIOTT, C. J.—The appellant was the plaintiff below, and in his complaint alleges that on the 6th day of February, 1871, the appellee bought at a tax sale, made by the auditor of Spencer county, a tract of land, and received the proper certificate of sale; that on the 14th day of May, 1873, he sold and delivered the certificate to one Logan Williamson and agreed to make a valid assignment thereof to him; that an assignment was written upon the certificate, but was not acknowledged as the statute requires; that afterwards Logan Williamson received a deed from the auditor, and on the 14th day of October, 1873, assigned and conveyed all his right and title to the appellant; that the certificate was a nullity because of the misdescription of the property; that the appellant, believing the sale to be invalid, desires to apply to the county commissioners to refund the amount paid, but that the defective assignment prevents him from successfully pressing such claim, and that the appellee refuses to acknowledge the assignment.

79	233
136	458
79	233
136	679
79	233
148	99

Williamson v. Hitner.

It is clear that no cause of action is stated in the complaint. It is evident that the parties were mistaken as to the legal effect of the assignment. Not only did they believe it to be valid, but this opinion is affirmatively shown to have been shared by the officer charged with the duty of issuing tax certificates and deeds. There was no fraud, no warranty, not even a representation. All that can be said is, that there was a mistake as to the legal effect of an instrument. It is a rudimental principle, that damages can not be recovered where the loss results from a pure mistake as to the legal effect of an instrument.

The negligence of appellant is a bar to a recovery. One who signs or receives an instrument must, in cases where there is no fiduciary relation existing, show that he used ordinary diligence in inquiring into and ascertaining the character of the instrument signed or received by him. *American Ins. Co. v. McWhorter*, 78 Ind. 136; *Clodfelter v. Hulett*, 72 Ind. 137; *Dutton v. Clapper*, 53 Ind. 276. It is the duty of persons entering into contracts to exercise ordinary diligence and prudence, and if they omit this they can not receive aid from the courts. *Beaver v. Trittip*, 24 Ind. 41; *First National Bank, etc., v. Gough*, 61 Ind. 147.

Where a party gets all he knowingly contracted for, no action lies, although that which he gets turns out to be of much less value than he supposed it to possess. The assignment secured to appellant all that the contract between him and the appellee contemplated that he should get, and he is therefore not in a situation to maintain this action. All that the appellant asked, and all that the appellee agreed to secure to him, was a deed, and, as the appellant secured this, he has no just ground of complaint, although it did not yield him all the benefit he anticipated.

Judgment affirmed.

Parker v. Teas et al.

No. 7794.

PARKER v. TEAS ET AL.

PLEADING.—Copy of Written Instrument.—Variance.—Where there is a variance between the allegations of a pleading founded on a written instrument, in regard to its contents, and the copy of the instrument therewith filed, the copy will control and will be presumed to be right, until the contrary is shown.

MORTGAGE.—Sufficiency of Description.—County and State.—Presumption.—Where the mortgagors describe themselves, in the mortgage, as “of Raysville, Henry county, Indiana,” and describe the mortgaged real estate as “lying in the northeastern part of the village of Raysville,” without naming any county or State, the conclusive presumption will be that the “Raysville,” last mentioned, is the one first mentioned and located in the same county and State, and the mortgage is not void for uncertainty as to the county and State in which the mortgaged real estate is situated.

SAME.—Office of Description.—When not Void for Uncertainty.—The office of the description of real estate, in a mortgage or other instrument, is to locate the premises intended to be embraced therein or affected thereby, with such reasonable certainty, as that they can be readily ascertained and possessed; and, where the premises are thus described, the instrument will not be held void for uncertainty in the description. Where the premises are described by given boundaries, and, also, as lying in a certain village, the boundaries will control, and the instrument will not be void for uncertainty, although the land within such boundaries is outside of such village.

SAME.—Reformation of Mortgage.—Complaint to Reform and Foreclose.—When the land intended to be mortgaged can be ascertained by the description in the mortgage, its reformation is unnecessary; and in such case a complaint to correct a supposed mistake in the description, and to foreclose the mortgage, will not be held bad on demurrer, merely because its allegations as to the mistake are not sufficient to entitle the plaintiff to a reformation of the mortgage.

From the Henry Circuit Court.

C. D. Morgan, J. H. Mellett and E. H. Bundy, for appellant.

C. M. Butler and J. Brown, for appellees.

Howk, J.—This case is now before this court for the second time. When it was first here the opinion and judgment of the court are reported under the title of *Barnaby v. Parker*, 53 Ind. 271.

Parker v. Teas et al.

When the cause was remanded to the circuit court, the appellant, Parker, the plaintiff below, filed the third, fourth, fifth and sixth paragraph of his complaint, in addition to the first two paragraphs which were considered by this court on the former appeal. To each of these additional paragraphs of complaint, the demurrers of all the appellees jointly, and of each of them separately, for the alleged insufficiency of the facts therein to constitute a cause of action, were sustained by the court, and to each of these rulings appellant excepted. Declining to amend or plead further, judgment was rendered against him for the appellees' costs.

In this court errors have been adjudged by the appellant which call in question the several decisions of the circuit court, in sustaining the demurrers, joint and several, of the appellees, to each of the additional paragraphs of complaint.

In the third paragraph of his complaint the appellant alleged in substance, that, on the 6th day of September, 1866, he and the appellees John C. and Belle Teas executed to one Ezra Scoville, their note for five hundred dollars, payable twelve months after date, with interest at ten per cent. from date; that appellant signed said note as the surety of said John C. and Belle Teas, at their instance and request, and received no part of the consideration therefor; that afterwards, on February 1st, 1867, the said John C. and Belle Teas executed to the appellant and one Philip D. Parker, their mortgage on the following real estate in Henry county, Indiana, to wit: "that certain tract of land lying in the north-eastern part of the village of Raysville, sold by Isaac Scott to John P. White, and by him to John C. Teas, containing five and one-half acres, more or less, bounded on the north by the land of Charles Barnaby or Kate Staff, on the east divided from the land of Samuel Pritchard by the public road leading north from Raysville, on the south by an alley running east and west between this tract and the lots of Newton and Lavina Brown, John Barnaby and Henry Staff, and on the west by the lots of Lawrence Durick and Charles Barnaby;" that

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the said mortgage was executed to appellant and Philip D. Parker, in consideration of their becoming security for said John C. and Belle Teas, on certain notes, and the express condition of the mortgage was, that if the said John C. and Belle Teas should pay or cause to be paid their certain notes on which the appellant or Philip D. Parker was, or might thereafter become, security for the benefit of said John C. and Belle Teas, then the mortgage should become void; that said mortgage was duly recorded in the recorder's office of said county, on February 22d, 1867, and a copy of said mortgage was filed with and made a part of said paragraph of complaint; that, at the time of the execution of said mortgage, the appellant was the surety of said John C. and Belle Teas, upon their above described note to said Ezra Scoville; that afterwards, in 1870, the said John C. and Belle Teas removed to the State of Missouri, leaving no property to pay said note, and had since become and were insolvent; and that the appellant had been compelled to pay, and had paid, the said note to the amount of six hundred and fifty dollars.

And the appellant further said, that, after the execution and record of said mortgage, to wit, on the — day of —, 18—, the said John C. and Belle Teas sold and conveyed by deed to said William Barnaby, all the real estate described in said mortgage; that afterwards, on the — day of —, 18—, the said Barnaby conveyed the same real estate by deed to the appellee John Bird; and that the said Bird was then the owner and in the possession of the same real estate. Wherefore, etc.

We gather from the briefs of counsel, as well of the appellees as of the appellant, that the demurrers to this paragraph and also to the fourth, fifth and sixth paragraphs of the complaint, were sustained by the circuit court, upon the ground that the description of the real estate, in the mortgage in suit, was so uncertain and insufficient as to avoid such mortgage. The description of the real estate, as contained in the mortgage, differs in some particulars from the description in the third paragraph of the complaint. But it is well settled by the deci-

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sions of this court, that, in such cases, the description in the instrument sued upon will control, and will be presumed to be correct until the contrary is shown. *Crandall v. The First National Bank, etc.*, 61 Ind. 349; *Cotton v. The State*, 64 Ind. 573; *The Watson Coal, etc., Co. v. Casteel*, 73 Ind. 296. It follows, therefore, that, in determining the question of the invalidity of the mortgage in suit, reference must be had to the copy of the mortgage filed with and made part of each paragraph of the complaint, instead of to the allegations of each paragraph.

When this case was before this court on the former appeal, the only question for decision was, whether or not the allegations of the second paragraph of the complaint were sufficient to entitle the appellant, Parker, to a reformation of the mortgage. The court then said: "We, therefore, decide nothing as to the sufficiency of the description; and there being no cause shown for a reformation of the mortgage, we decide nothing as to the right of the appellee" (now appellant) "to reform the mortgage as against the subsequent purchasers."

In the third paragraph of the complaint the question of the sufficiency of the description in the mortgage in suit is presented for decision without regard to any reformation of the instrument. We set out, in this connection, so much of the mortgage as has any bearing upon the question of the sufficiency of the description, as follows:

"This indenture, made the first day of the 2d month, commonly called February, 1867, witnesseth, That John C. Teas, of Raysville, Henry county, Indiana, and Belle Teas, his wife, in consideration of Isaac and Philip D. Parker becoming their security on certain promissory notes, have granted and sold, and by these presents do grant, sell and convey to the said Isaac Parker and Philip D. Parker, that certain tract of land lying in the northeastern part of the village of Raysville, sold by Isaac Scott to John T. White, and by him to John C. Teas, containing five and one-half acres, more or less, bounded on the north by the land of Charles Barnaby or Kate Staff, and

on the east divided from the land of Samuel Pritchard by the public road leading north from Raysville, on the south by an alley running east and west between this tract and the lots of Newton and Lavina Brown, John Barnaby and Henry Staff, and on the west by the lots of Lawrence Durick and Charles Barnaby; to have and to hold," etc.

The mortgage appears to have been acknowledged by the mortgagors on February 16th, 1867, before a notary public of Henry county, and to have been recorded on February 22d, 1867, in the recorder's office of said county.

It is claimed by the appellees' counsel, as we understand their position, that the mortgage was absolutely void for uncertainty in the description of the mortgaged real estate, in this, that it did not appear in the mortgage in what county or State the real estate therein described was situated. It does not seem to us that this position is well taken or can be maintained. The mortgage provides, by fair and reasonable construction, that John C. and Belle Teas, of Raysville, Henry county, Indiana, mortgaged the real estate in the northeastern part of said village of Raysville, in said county and State. When, by the terms of the mortgage, Raysville had once been located in Henry county, Indiana, it was wholly unnecessary, as it seems to us, in the subsequent mention of Raysville, in the same instrument, to specify again the county and State in which such village or town was located. For, in such a case, the fair and reasonable presumption is that the Raysville subsequently mentioned is the same Raysville first mentioned, and, of course, located in the same county and State; and this presumption must be regarded as conclusive, where, as in this case, the Raysville subsequently mentioned is not, by the terms of the instrument, located in some other county and State than is the first mentioned Raysville.

The object and office of the description of real estate, in a deed, mortgage or other instrument, are to locate the premises intended to be embraced therein and affected thereby, with such reasonable certainty as that they can, if necessary, be

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readily found, ascertained and possessed. It can not be doubted, we think, that the description of the real estate in the mortgage in suit is so clear in its terms and so free from uncertainty, that any officer or other person, with the mortgage before him, would promptly locate the real estate in Henry county, Indiana, and would not think that it was located elsewhere, from the language used in the instrument. We are of the opinion, therefore, that the record of the mortgage was constructive notice of its contents to the subsequent grantees, near or remote, of John C. and Belle Teas, of the real estate mortgaged, and that the third paragraph of the complaint stated facts sufficient to constitute a cause of action against each and all of the appellees. *Rosenbaum v. Schmidt*, 54 Ind. 231; *Halstead v. The Board, etc., of Lake Co.*, 56 Ind. 363; *Rucker v. Steelman*, 73 Ind. 396.

It is further claimed that the mortgage in suit is void for uncertainty in the description, because the mortgaged real estate is described as lying in the northeastern part of Raysville, while the boundaries given embrace real estate not in but outside of Raysville. This fact, if it be the fact, is not apparent either in the complaint or in the mortgage; and, therefore, the question is not presented by appellees' demurrers. But, if the question were before us, we should be inclined to hold that the mortgage was a valid lien on the real estate embraced in the boundaries given, whether in or out of Raysville, and that this variance in the description would not avoid the mortgage.

Our conclusion is, that the court erred in sustaining the demurrers, joint and several, of the appellees to the third paragraph of the appellant's complaint.

Each of the fourth, fifth and sixth paragraphs of the complaint contains substantially the same allegations of fact as are contained in the third paragraph, with additional averments differing not only from the third paragraph, but also each from the others.

The fourth paragraph of the complaint contains some allegations in regard to a supposed mistake in the mortgage in suit, in relation to the description of the mortgaged real estate. We do not think that the allegations of this paragraph in regard to such mistake were sufficient to show that the appellant was entitled to any reformation of the mortgage; nor do we think that these allegations showed that any reformation of the mortgage was necessary. The other allegations of the paragraph were sufficient to withstand the appellees' demurrers thereto, and to entitle the appellant to the foreclosure of the mortgage as against all the appellees.

In the fifth paragraph of his complaint, in addition to the same allegations of fact as were contained in the third paragraph, the appellant set out at length the descriptions of the mortgaged real estate, as contained in the deed from Isaac Scott to John T. White, and in the deed from said White to said John C. Teas, both of which deeds were mentioned in the description of the real estate in the mortgage in suit. In the sixth paragraph of his complaint, in addition to the same facts stated in the third and fifth paragraphs, the appellant also set out therein full descriptions of all the lots and parcels of real estate, mentioned in the mortgage in suit as constituting the boundaries of the mortgaged real estate. What we have said, in considering the sufficiency of the third paragraph, is equally applicable to the fifth and sixth paragraphs of the complaint. In each of these paragraphs of complaint, the only question presented by the demurrers thereto seems to have been the supposed insufficiency of the description of the mortgaged real estate; and upon this question we have no doubt as to the sufficiency of the description. "There is no apparent ambiguity in the description, and the land described can be easily found, and its boundaries ascertained. The description is sufficient whenever the land intended to be mortgaged can be ascertained by it." *English v. Roche*, 6 Ind. 62.

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The court erred, we think, in sustaining each and all of the demurrers to the fifth and sixth paragraphs of the complaint.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to overrule all the demurrers to each of the third, fourth, fifth and sixth paragraphs of the complaint, and for further proceedings not inconsistent with this opinion.

79	242
129	129
79	242
130	149
79	242
152	563

No. 7892.

DOWNEY ET AL. v. WASHBURN.

JUDGMENT.—*Payment.*—*Lien in Favor of Replevin Bail.*—*Entry or Return of Satisfaction.*—*Notice.*—Under the 676th section of the code (R. S. 1881, sec. 1214,) in the case of replevin bail for the stay of execution on a judgment, and in other cases provided for, if the suretyship or other corresponding fact necessary to entitle the party to the benefit of the section, appear of record, an entry or return of satisfaction of the judgment, it not being shown by whom the payment was made, shall not be deemed to extinguish the lien of the judgment, upon the real estate of the judgment debtor, in favor of the replevin bail or other person entitled thereto, if the payment was made by him, as against the grantees of the judgment debtor, though they purchased without actual notice of such lien.

SAME.—*Notice to Purchaser of Real Estate.*—Where the entry or return of satisfaction by payment of a judgment is silent in respect to the person by whom the payment was made, and the fact is apparent of record that there is a party so related to the judgment as to be entitled to the lien thereof under the 676th section of the code, a purchaser of the land of the judgment debtor is put upon inquiry whether the payment was made by the one entitled to keep the judgment alive. ELLIOTT, C. J., dissents.

From the Wabash Circuit Court.

M. H. Kidd, for appellants.

W. G. Sayre, for appellee.

WOODS, J.—Action by the appellee against the appellants to enjoin the sale on execution of certain real estate. Finding

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and judgment for the plaintiff. No question is made upon the complaint or other pleadings, but only upon the sufficiency of the evidence to sustain the finding and judgment of the court.

The entire evidence consisted of an agreed statement of facts, in substance as follows, viz.: On and before December 11th, 1876, Benjamin F. Roberts was the owner of the real estate in question, and on that day, for an adequate consideration then paid, conveyed the same to the appellee by a deed of general warranty, which was duly recorded.

On the 19th day of November, 1868, Timothy Donovan recovered in the court of common pleas of Wabash county, where said real estate was situate, a judgment for \$1,161.31 against said Roberts and another, on which judgment Solomon Downey, the appellant, on January 16th, 1869, became replevin bail for the stay of execution, and as such made certain payments on said judgments, to wit: on July 17th, 1869, one hundred dollars, and on June 14th, 1870, sixty-five dollars; there was nothing in the record showing that said Downey made said payments, or any payments whatever, upon said judgment. Several executions were issued on said judgment after the expiration of the stay, on the last of which the sheriff made the following return: "I return this writ satisfied in full as shown by plaintiff's receipt for prin. and int. * * * * Sale of real estate made on this execution set aside by direction of plaintiff as shown by order herewith filed," signed "John McKahan, sheriff." Accompanying this return were receipts, endorsed on the writ, signed by the attorneys of the judgment plaintiff, as follows, viz.: May 29, 1869, \$98.88; July 5, 1869, \$650; July 15, 1869, \$350, and August 19, 1870, \$56.96 "in full of balance, principal and interest;" and the following release: "State of Indiana, Wabash county, ss. I, Timothy Donovan, do hereby release all my right, title and interest to any land bought by me at sheriff's sale," etc., "and especially the land bought in by me and taken as the property of Solomon Downey, replevin bail on said judgment. Witness my hand and seal this 19th

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day of August, 1870. Timothy Donovan." Said return, release and receipts were duly recorded in the proper execution docket. On January 12th, 1870, said Downey instituted in the Wabash Circuit Court an action against said Roberts, claiming that he, Downey, had made¹ payment of said sums on said judgment, and that said judgment remained unsatisfied and in force for his use; and in said action recovered a judgment awarding him an execution for said amounts and interest, and accordingly on the 23d day of May, 1877, said Downey caused an execution to be duly issued on said judgment in favor of Donovan against Roberts and McClure, and in his favor as replevin bail against the property of said Roberts, which execution came into the hands of the defendant Harvey F. Woods, the sheriff of said county, who has levied the same on, and by virtue thereof is about to sell, said real estate. Said Roberts is insolvent, and said McClure became a non-resident of the State, and died several years before January, 1877. At the time of purchasing said real estate, Washburn had no actual notice and no notice at all of the payments by Downey, unless the return of the sheriff with the receipts and release by Donovan of the sale of Downey's land, as above set out, amounts to constructive notice.

The question for solution is, whether on these facts the appellee was entitled to a finding and decree enjoining the sale of the property, upon the execution issued in favor of Downey, as replevin bail.

The appellee has not favored us with a brief. The counsel for the appellants, by implication at least, concedes that if the appellee purchased without notice of Downey's having made payments on the judgment, he took the land free from the lien of the judgment; but insists that on the facts stated he had constructive notice, in this, that the return of the sheriff showing that the writ in the first instance was satisfied by a sale of the land of the replevin bail, and that the land was subsequently released from that sale by the purchaser, "was sufficient to put the appellee on inquiry."

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We can not say, as matter of law, that the facts so returned by the sheriff amounted to constructive notice, or were enough to put the purchaser on inquiry, as contended. The most that can be said, and it may be too much to say, is, that the return constituted evidence tending to show or suggest that Downey may have paid something on the writ, and that the purchaser ought to have made inquiry; but, regarded only as evidence in that direction, the finding of the circuit court against such conclusion is final. The case is not one upon an agreed state of facts, calling simply for a conclusion of law by the court, but it is one upon an agreement as to the evidence on which the court rendered a general finding, involving a conclusion both of law and fact.

The inquiry, therefore, comes to this: If the replevin bail on a judgment pays the same in whole or in part, and the judgment is satisfied of record, either by the return of the sheriff on an execution, or by an entry of the clerk if the payment was made to him, and it is not shown of record by whom the payment was made, whether by the judgment debtor or by the replevin bail, does the purchaser of the real estate of the judgment debtor, who buys without actual notice, take a title free from the lien of the judgment as against the replevin bail?

By section 225 of the code, every judgment or decree shall be deemed satisfied after the expiration of twenty years; and, by section 527, all final judgments of the Supreme and circuit courts and courts of common pleas, for the recovery of money or costs, shall be a lien upon real estate and chattels, liable to execution in the county where the judgment is rendered, for the space of ten years after the rendition thereof and no longer.

The clerk is required to keep judgment and execution dockets, and in the latter to "prepare an additional column, in which he shall enter at length the return of the sheriff; and such docket entries shall be taken and deemed to be a record." Section 517. But it is not enacted or declared that the return of an execution as satisfied or paid shall operate as a discharge

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or satisfaction of the judgment on which the writ was issued; that is only a matter of legal inference, which doubtless follows in every case not governed by a contrary statutory provision.

By section 676 of the code, however, it is enacted, that "When any defendant-surety in a judgment or special bail or replevin bail, or surety in a delivery bond, or replevin bond, or any person being surety in any undertaking whatever, has been or shall be compelled to pay any judgment or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship, or when any sheriff or other officer, or any surety upon his official bond, shall be compelled to pay any judgment or any part thereof, by reason of any default of such officer, except for failing to pay over money collected, or for wasting property levied on, the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety, officer or other person making such payment, and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use."

This provision that the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, is at once specific and comprehensive, and leaves room only for this inquiry, namely, whether it must appear of record that the satisfaction was by "such payment," that is, a payment made by the bail or other surety?

Independent of any statutory provision, it is the undoubted right of a surety or indorser, or any one standing in a like relation to the principal debtor, if compelled to pay the debt, to be subrogated to the rights of the creditor, and, in case the creditor has a judgment, to use that judgment for the purpose of coercing payment by the principal. Freeman on Judgments, section 470, *et passim*; *Manford v. Firth*, 68 Ind. 83. In *Baily v. Brownfield*, 20 Pa. St. 41, the Supreme Court of Pennsylvania, speaking by BLACK, C. J., says: "The entry of satisfaction of a judgment collected by execution from a surety, such entry not being made at the instance of the

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surety, is no ground for refusing subrogation. Whether the fact of payment does or does not appear on the record, it can not be allowed to have any influence on the rights of the parties, except what equity gives it."

If, therefore, this section of the code was designed to preserve the lien of the judgment for the surety's benefit, as against the judgment defendant and those claiming under him with notice only, then the statute has accomplished for the surety only what equity was doing for him already, and doing just as well as can be done under the statute. We think the statute was intended and may well be so interpreted as to accomplish more than a mere equitable subrogation. By the very terms of the enactment, as between the judgment plaintiff and judgment debtor, the judgment must be fully paid before the rights of the bail, surety or other persons provided for, can intervene; and it would seem to be an inconsistent and illogical conclusion to hold that the return of the sheriff, showing one of the facts necessary to the existence of a right, shall be deemed in any instance to destroy the right.

In *Lapping v. Duffy*, 65 Ind. 229, it was held that a receipt upon the record of a judgment, acknowledging payment thereof, could be explained or contradicted, as against a purchaser without notice, and this conclusion is put upon the ground that the law does not provide for the receipting of judgments on the record, nor for the effect of such receipts. Whatever may be thought of that case in itself, the reasoning of it may be fairly applied here. The law does not provide that the sheriff, in making return of money collected upon an execution, shall show of whom it was collected. It may possibly be within his duty to show the facts in this respect, if known to him, and it may be that his return would be conclusive on the parties until set aside; but, in this case, the return is silent on the subject.

The bare fact of payment of the writ in full is shown, a fact, as already suggested, necessary to, and tending to show, the appellant's right to have the judgment remain alive for his use;

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having that tendency at least as much as to warrant an inference that the payment had been made by the judgment debtor.

There can be no certain or legal inference from the mere fact of payment of a debt, that it was paid by the principal debtor rather than his surety. A reasonably prudent man would not, in an important matter, act on such presumption.

If the conveyance of the property had been made while the execution was still in the hands of the sheriff, after the payment but before the return, would the purchaser have been permitted to obtain from the officer the simple statement that the writ had been paid, and from that to infer that the principal debtor had made the payment, or would he not rather have been bound to make further inquiry on the subject? And if, while the writ is in the officer's hands, the purchaser may not rely on a knowledge of the bare fact of payment, why does that fact become more significant when made a matter of record? As a rule, a recorded fact is of no more import than an unrecorded one, to those who have knowledge of it.

A due regard for the purpose intended to be accomplished by the section of the code referred to, as well as for the rights of purchasers claiming under the judgment debtor, requires us to hold, and we do hold, that in the case of replevin bail for the stay of execution on a judgment, and in other cases provided for, if the suretyship or other corresponding fact necessary to entitle the party to the benefit of the section appear of record, an entry or return of satisfaction of the judgment by payment, it not being shown by whom the payment was made, shall not be deemed to extinguish the lien of the judgment in favor of the bail or other person entitled thereto, if the payment was made by him, as against purchasers from the judgment debtor. The fact, apparent of record, that there is a party so related to the judgment as to be entitled to the benefit of the provisions of said section, if compelled to pay the judgment, must be deemed sufficient to put the purchaser on inquiry whether the payment was made by such person, if the record is silent in that respect.

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Judgment reversed, with instructions to sustain the motion for a new trial.

DISSENTING OPINION.

ELLIOTT, C. J.—I can not divest my mind of the conviction that a proper application of the law governing the rights of *bona fide* purchasers of real estate leads to a conclusion different from that declared in the prevailing opinion.

A purchaser who pays full value, acts in good faith and exercises ordinary diligence, is always protected against rights of which he has not actual or constructive notice. In the case under consideration there is the utmost good faith, no want of diligence and no notice. It is not pretended that there was actual notice. Was there constructive notice? The return of the sheriff showed that the judgment was satisfied. This was the record. The purchaser was not bound to look beyond the face of the record. I suppose *bona fide* purchasers have a full right to act upon natural and legal presumptions and can not go wrong when they do so. The natural presumption is that the original, principal debtor is the one who pays the debt, not his surety, who has received no benefit from the contract. This is also the legal presumption. It is embodied in the rudimental principle, that the law imputes to every man an intention to fulfil his obligation. The obligation to pay the judgment rested on the debtor, and not on his bail; and, in the absence of some showing to the contrary, a purchaser would have a right to act upon the presumption that the judgment was paid by the person against whom it was rendered. It is upon this general principle that one of the rules governing the application of payments rests. It is universally held that where money is paid to a creditor holding several obligations, upon some of which the debtor is immediately liable, and upon others contingently or collaterally, the payment will be applied upon the debt for which the debtor is immediately liable, unless directions to the contrary are given. The reason of the rule is, that it

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is presumed that the debtor meant to pay and did pay his own debt. *Snyder v. Robinson*, 35 Ind. 311 ; 1 Am. L. Cases, 277.

Another strong presumption comes to the purchaser's relief. Payment of a judgment is presumptively an extinguishment. A party who shows payment makes out a *prima facie* case, and it devolves upon his adversary to show some reason why this *prima facie* case shall not prevail. A purchaser finding of record in the proper place, made by the proper officer, an entry of payment of a judgment, has a right to presume, nothing to the contrary appearing, that it is extinguished. In doing this he but acts on a legal presumption, everywhere recognized.

These legal presumptions are sufficient of themselves, as I think, to entitle the purchaser to hold the property free from the judgment, but they are strengthened by the further consideration that the law requires that the judgment shall be made out of the property of the principal debtor. What is the natural presumption flowing from this doctrine, if it be not that the money which paid the judgment came from the man who ought to have paid it? If the debtor was shown to have had no property, there would be some reason for disputing the applicability of this presumption, but it here appears that he did have property.

In this particular instance the general presumptions referred to are strengthened by the fact that, although the bail's property was levied on and sold, it was afterwards released by agreement. This fact lends support to the presumption that the principal debtor paid his own debt and thus secured the release of his surety's property.

It is not imposing an unreasonable burden upon a replevin bail, who pays a judgment, to require him to cause that fact to appear of record. Dead the judgment would be, but for the provisions of the statute, in favor of replevin bail, and surely the bail ought to have the return or record show payment by him, and thus secure the life-preserving power of the statute. It is no great task to take such precaution as will make

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the return show by whom the judgment was paid. One who desires to keep alive an apparently dead judgment, should do some affirmative act which will carry notice to *bona fide* purchasers. A man may push the right of self-defence to the last extremity upon appearances, and surely appearances may protect one who honestly buys property and pays full value. One who would make a thing different from what it appears to be, should do some affirmative act revealing the difference. It was in the power of the bail to have given notice that he paid the money. Ordinary diligence would have enabled him to do this, and a man who fails to exercise diligence, where diligence is necessary, ought not to have the helping hand of the court extended to him.

This outline of my views is sufficient to indicate, but not to unfold, the reasons which impel me to dissent from the opinion of the majority.

No. 8147.

PATTERSON v. NIXON ET AL.

PARTITION.—*Estoppel.*—*Vendor and Purchaser.*—*Adverse Possession.*—An answer in partition, that the defendant had purchased the lands in good faith and for a valuable consideration, and that before such purchase, and before any conveyance to the plaintiff, the grantor of the plaintiff informed him that he had no interest in the land, by reason whereof, and relying thereon, the defendant purchased and was in possession adverse to all others, and claiming as owner when the plaintiff took conveyance, is insufficient on demurrer.

SAME.—*Champerty.*—*Tenants in Common.*—*Conveyance.*—The possession of a tenant in common of lands, who has ousted his co-tenant, and holds adversely to him, does not impair a conveyance by the latter of his share, the doctrine of *champerty* having no application to such cases.

WILL.—*Construction.*—*Title to Real Estate.*—A testator devised his farm and certain property to his wife for life, and "at her death the farm to belong to my son, Thomas J.," together with certain personal property.

79	251
136	427
79	251
137	129
79	251
145	136

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After certain other specific devises and bequests, the will proceeded: "and the balance of my ——— is to be sold and turned into money, and debts owing to me collected and then put to interest to educate my daughters and son Thomas J. equally, and the principal is to be divided in the following manner: My son Thomas J. is to have two shares, and each of the girls one share; if any of the last named seven daughters or my son Thomas J. should die before they come of age, then their part is to be divided among the other seven."

Held, that Thomas J. took the farm absolutely in fee simple, though he died before reaching his majority.

From the Pike Circuit Court.

E. A. Ely and *C. H. Burton*, for appellant.

F. B. Posey and *J. W. Wilson*, for appellees.

WORDEN, J.—Action by the appellant against the appellees for partition. The complaint, after entitling the cause and stating the names of the parties, was as follows:

"The plaintiff complains of the defendants, and says that she and they are the owners in fee simple and tenants in common of the following described real estate situated in Pike county and State of Indiana, to wit:" (description.) "That one Thomas J. Conger departed this life intestate, and seized in fee simple of said real estate, on the 1st day of March, 1856, leaving neither widow nor children surviving him, but leaving as his only heirs at law Matilda Conger, his mother, William J. Conger and Jonathan, his brothers, Margaret Conger, Matilda Chappell, Melissa Brenton, Indiana Nixon and Hester Conger, his sisters, and Matilda Hughan, Agnes Hughan, Jesse Hughan and Alexander Hughan, Jr., his nephews and nieces, the children of Polly Hughan, his deceased sister. That William J. Conger aforesaid conveyed his interest, to wit: one-sixteenth part in value of said real estate to one John Conger, on the 29th day of July, 1871, who bequeathed the same by his last will and testament to the plaintiff, and departed this life on the 27th day of February, 1876, testate. That afterwards on the 29th day of February, 1876, said will was duly probated. That said Matilda Conger, Matilda Chappell, Melissa Brenton, Margaret Conger and Hester Conger,

conveyed their entire interest in said real estate to the defendant William Nixon, prior to the beginning of this suit. That said Jonathan Conger departed this life intestate prior to the beginning of this suit, leaving as his heirs at law the defendant Hannah Conger, his widow, and the other defendants (save the Nixons and Hughans), his children. That the plaintiff is the owner of the undivided one-sixteenth part in value of said real estate, and derived her title thereto by will, from John Conger, deceased, as aforesaid, who derived his title from one William J. Conger by deed, who derived his title by descent from his brother, said Thomas J. Conger, deceased. That the defendants Hughan (save Alexander Hughan, Sr.,) (said Alexander Hughan, Sr., claims an interest in said real estate and is made defendant herein to answer to his interest if any he has) are the owners of the undivided one-sixteenth part thereof, and derive their title by descent from said Thomas J. Conger. That the defendant Indiana Nixon is the owner of the undivided one-sixteenth part thereof, and derived her title by descent from said Thomas J. Conger, deceased, and the defendants Conger are the owners of the undivided one-sixteenth part thereof, and derive their title by descent from Jonathan Conger aforesaid, deceased, who derived his title by descent from said Thomas J. Conger, deceased; and the defendant William Nixon is the owner of the undivided three-fourths part thereof, and derived his title by conveyance and purchase from Matilda Conger, Margaret Conger, Matilda Chappell, Melissa Brenton and Hester Conger aforesaid, who derived their title from said Thomas J. Conger, deceased. Wherefore," etc.

The second and fourth paragraphs of the answer by William Nixon were as follows:

"Paragraph 2d. And for further answer to plaintiff's complaint the defendant William Nixon says, that he purchased the lands mentioned in the plaintiff's complaint, in good faith from the parties therein mentioned, and paid a valuable consideration therefor. That he was informed by the William

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J. Conger mentioned in said complaint, through whom plaintiff claims title, before he, defendant, became purchaser thereof, and before the deed to John Conger, mentioned in plaintiff's complaint, was executed, that he, the said William J. Conger, had no interest in said lands, and by reason of said information, and relying thereon, the defendant purchased said lands; and at the time of the execution of the deed from William J. Conger to John Conger, mentioned in the plaintiff's complaint, the defendant was, and for a long time prior thereto had been, in the possession of said real estate, claiming to own the same adversely to all others.

"Paragraph 4th. The defendant William Nixon, for further amended answer to plaintiff's amended complaint, says, that at the time William J. Conger made said conveyance of said real estate, in plaintiff's complaint mentioned, to said John Conger, he, the said Nixon, was, and had been long prior thereto, in peaceable possession of said land, claiming to own it adversely to all others. That the relation of tenancy in common, or any other relation of tenancy among or between said defendant and plaintiff in plaintiff's complaint, did not exist at the time said William J. made said conveyance to said John Conger. That said William Nixon had, a long time prior thereto, ousted all the parties in the plaintiff's complaint mentioned, other than himself, from said land, and was occupying and claiming to own it adversely to all the world. Wherefore," etc.

The plaintiff demurred to these paragraphs of answer severally, for want of sufficient facts, but the demurrers were overruled, and such further proceedings were had as that judgment was rendered for the defendant.

Error is assigned upon the rulings on the demurrers.

The second paragraph of answer was clearly bad, and the demurrer to it should have been sustained. It attempted to set up matter of estoppel.

It does not appear from the paragraph, when the defendant was informed by William J. Conger that he had no interest

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in the lands, except that it was before the defendant purchased and before the deed to John Conger. For aught that appears it may have been before the death of Thomas J. Conger, and, therefore, before any portion of the land had descended to William J. Conger.

But aside from this the paragraph is radically defective. It does not appear either:

1. That the statement of William J. Conger was made with knowledge of the facts;
2. That the defendant was ignorant of the truth of the matter; or,
3. That it was made with the intention that the defendant should act upon it. See *Hosford v. Johnson*, 74 Ind. 479; *Lee v. Templeton*, 73 Ind. 315.

We have not considered whether the paragraph was sufficient in other respects.

The fourth paragraph was intended to show that at the time of the conveyance from William J. to John Conger, the land was in the adverse possession of the defendant, assuming, therefore, that the conveyance was void, and that John Conger had no title to devise to the plaintiff.

The paragraph does not profess to set up any title in the defendant to the portion of the land claimed by the plaintiff, and, unless the matters alleged show that the plaintiff has no title, the pleading is bad.

From an early period the general doctrine has prevailed in this State, that a conveyance of land in the adverse possession of another person is void as against the person thus having the adverse possession. *Fite v. Doe*, 1 Blackf. 127; *Martin v. Pace*, 6 Blackf. 99; *Galbreath v. Doe*, 8 Blackf. 366; *Michael v. Doe*, 1 Ind. 481; *The German Mutual Insurance Company of Indianapolis v. Grim*, 32 Ind. 249; *Steeple v. Downing*, 60 Ind. 478. But the doctrine has no application to judicial or official sales. *McGill v. Doe*, 9 Ind. 306; *Webb v. Thompson*, 23 Ind. 428; *Vannoy v. Blessing*, 36 Ind. 349.

In *Webb v. Thompson*, above cited, the court said: "It is

not the inclination of the courts in this country to carry the doctrine of champerty any further than it has already gone."

The doctrine has but little to support it in this country, except that it is an established rule drawn from the jurisprudence of the mother country, and has been constantly adhered to in this State from the time of its organization.

Chancellor Kent says: "The ancient policy which prohibited the sale of pretended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. A right of entry was not assignable at common law, because, said Lord Coke, 'under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed.'" 4 Kent Com. 447, 12th ed.

The rule has been shorn of some of its harsh features, it having been decided that, though such conveyance is void as against the party in possession, it is good between the grantor and grantee, and persons standing in legal privity with them; and that the grantee in such case may use the name of his grantor in an action to recover the land, and the recovery will enure to the benefit of the grantee. *Steeple v. Downing, supra.*

But the rule, in our judgment, should have no application whatever to the case of a possession by one tenant in common, adverse to his co-tenant.

There may, to be sure, be an ouster of one co-tenant by another, so that the statute of limitations will run in favor of the latter. But, as was said in the case of *Jenkins v. Dalton*, 27 Ind. 78, "It is well settled that the possession of one tenant in common is constructively the possession of all, the possession of one being deemed to be for the benefit of himself and his companions; and that to disseize his co-tenants, there must be an actual ouster, or such acts as are constructively equivalent to an ouster, and from which an ouster may be presumed."

In *Bowen v. Preston*, 48 Ind. 367, the law on the subject is

thus stated : " It is also a rule of law that the seizin of one joint tenant is the seizin of his companions as well as of himself. The same rule is applied to co-parceners and tenants in common. The possession of one of them is constructively the possession of all ; and hence it seems to follow, that possession or seizin of one will be the seizin of others as against all strangers ; and the possession of one will constructively be held for the benefit of himself and of his companions. To disseize his companions there must be an actual ouster, or there must be such acts as are constructively equivalent to an ouster ; as the denial of right to the rent of any part, or the possession of any part, of the land, or an exclusive possession for a long time, so as to afford the presumption of a disseizin." See also *Nicholson v. Caress*, 59 Ind. 39.

Now, it seems to us to be clear that when one proposes to purchase the interest of a parcener or tenant in common in land which is in the possession of a co-parcener or co-tenant, he may assume, and act upon the assumption so far as the question of maintenance is concerned, that the possession of the one is the possession of all, and for the benefit of all, whatever the real facts may be as to the character of the possession.

When a purchase is made of land in severalty, which is in the possession of another, the possession is not only notice generally of the rights of the latter therein, but if the possession is adverse, though without right, the conveyance is void as to him. In such case there is nothing to indicate to the purchaser that the person in possession is holding for any one but himself. Not so, however, with the possession of a co-tenant, for until there is an ouster, actual or constructive, of which the purchaser is not bound to take notice, the possession of the one is deemed the possession of all.

It follows that the fourth paragraph of answer was insufficient, and that the demurrer to it should have been sustained.

The appellees have assigned a cross error upon the sustaining of a demurrer to the first paragraph of their answer.

That paragraph was designed to show that by the will of Sebastian Conger, the father of Thomas J. Conger, deceased, the latter having died, as is alleged, before he was twenty-one years of age, the said Thomas J. did not receive title to the land, but that it went to his sisters, under whom the defendant Nixon claims. So much of the will as is necessary to an understanding of the point is as follows:

"First. I give and bequeath to my beloved wife, Matilda" (here certain articles of personal property are mentioned, then the will proceeds), "and the farm her lifetime, and at the time of her death the farm is to belong to my youngest son, Thomas J., and all the sheep and two pairs of horse-gears, double-trees, single-trees and all the household and kitchen furniture, the wagon and flax brake, all the leather that is at Hillman's tanyard and a side of leather at J. Davidson's, is to belong to my wife. My son Jonathan has received his full dowry. I give and bequeath to my second son, W. J. Conger, two pieces of land east of J. G. Crow's land in the bottom, one hundred acres. I give and bequeath to my third son, John, a piece of land containing one hundred and ten acres and a fraction, in section 13, town. 1 N., R. 9 W.; one horse, saddle and bridle and some hogs that is called his property. The debts that I owe John Logan is to be paid by my wife, Matilda, and she is to have all the poultry of every kind, and the balance of my — is to be sold and turned into money, and debts that is owing to me is to be collected and then put to interest, to be used to educate my daughters and my youngest son, Thomas Jefferson, equally, and the principal is to be divided in the following manner: My son, T. Jefferson, is to have two shares and each of the girls one share each. If any of the last named seven daughters, or my son, Thomas Jefferson, should die before they come of age, then their part is to be divided among the other seven. * * * I add a codicil to my will, that my son, John, have a cow and calf; I also wish my youngest son, T. Jefferson, to have fifty dollars over and above what I have

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already given him for education, out of the interest that will be derived from my property and debts due me.”

It will be seen by the forepart of the will, that the farm was bequeathed to the testator's wife for life, and at her death to go to Thomas J.

The appellees claim that the clause, providing that if any of the seven daughters, or Thomas J., should die before coming of age, “their” part is to be divided among the other seven, was intended to embrace the farm.

But we can not give the will such construction. The obvious meaning of the will is, that the part of the one that should die, in the fund that was to be raised and put at interest for the education of Thomas J. and the daughters, should be divided among the other seven. The will did not contemplate the division of the farm among the daughters in the event that Thomas J. should die before coming of age.

No error was committed in sustaining the demurrer to the paragraph.

For the errors committed against the appellant, the judgment must be reversed.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

No. 8731.

PIERCE v. OSMAN ET AL.

79	259
147	421

MARRIED WOMAN.—*Contract.*—*Attorney's Fee.*—*Lien.*—Prior to the act of March 25th, 1879, Acts 1879, p. 160, a married woman could not charge her separate real estate by a contract wherein she agreed to pay for services rendered by an attorney in defending her title thereto, and wherein she agreed that the stipulated sum should be a charge upon the property.

From the Daviess Circuit Court.

Pierce v. Osman et al.

*J. T. Pierce, T. E. Johnson and W. D. Bynum, for appellant.
W. Armstrong and S. E. Kercheval, for appellees.*

ELLIOTT, C. J.—The appellant's theory is that a married woman might, prior to the act of 1879, charge her separate real estate by a contract wherein she agreed to pay for services rendered by an attorney in defending her title, and wherein she agreed that the stipulated sum should be a charge upon the property. There has been much conflict in our decisions upon the vexed question of the right of a *feme covert* to create a charge upon her separate real estate, but the later cases have finally settled the rule to be that she can only charge her lands in the mode prescribed by statute. This is the only defensible doctrine. Any other would be in effect an abrogation by the judiciary of an express statutory provision. If the contrary doctrine were allowed to prevail, then the *feme covert* might do by indirection what she could not directly do. It is, however, unnecessary to discuss the question; the cases settle it. The rule of *stare decisis* is a wise and salutary one, and the fewer the breaches of it in the law of property the better. From among the great number of cases holding that the separate property of a married woman can only be incumbered by her in the manner prescribed by the statute, we cite the following: *Miller v. Albertson*, 73 Ind. 343; *Wooden v. Wampler*, 69 Ind. 88; *Williams v. Wilbur*, 67 Ind. 42; *Richards v. O'Brien*, 64 Ind. 418; *Hamar v. Medsker*, 60 Ind. 413; *American Ins. Co. v. Avery*, 60 Ind. 566; *Behler v. Weyburn*, 59 Ind. 143; *Thomas v. Passage*, 54 Ind. 106.

The cases which hold that a mechanic may acquire a lien against the property of a married woman are not in conflict with the doctrine of the cases cited. *Jones v. Pothast*, 72 Ind. 158; *Vail v. Meyer*, 71 Ind. 159; *Shilling v. Templeton*, 66 Ind. 585. These cases rest upon the principle that the law, and not the act of the *feme covert*, creates the lien. The older cases, holding that the contract must show an intention on the part of the married woman to charge her property, or

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no lien could be acquired, rested on the principle upon which appellant has constructed his theory, and were radically erroneous. It is, as the later cases hold, not the married woman's contract, but the law which gives the lien, and this doctrine is in full opposition to that for which appellant contends. His position is, not that the lien arises by operation of law, but that it springs from the contract of the *feme covert*.

Judgment affirmed.

Petition for a rehearing overruled.

No. 8986.

79	261
141	506

THE BALTIMORE, OHIO AND CHICAGO RAILROAD COMPANY v. BARNUM.

BILL OF EXCEPTIONS.—Evidence.—“Offered” and “Given” not Equivalent.—In a bill of exceptions, the words, “This was all the evidence *offered* in the cause,” are not equivalent to the words, “This was all the evidence *given* in the cause.”

SAME.—“Here Insert.”—Unauthorized Transcript of Exhibits Annexed.—Unless a bill of exceptions contains the direction “here insert,” the clerk is not authorized by the court to copy into the transcript exhibits annexed by him to the bill of exceptions after the signature of the judge.

INSTRUCTION.—Expression of Confidence in Jury.—A single instruction, briefly expressing confidence in the prudence and impartiality of the jury, is harmless.

From the Noble Circuit Court.

J. H. Carpenter, for appellant.

A. A. Chapin, for appellee.

MORRIS, C.—The appellee brought this suit against the appellant to recover the value of a quantity of wheat, which, it is alleged in the complaint, had been stored by the appellee in the appellant's warehouse, and was, on the 25th day of May, 1878, destroyed by fire, through the gross negligence and carelessness of the appellant.

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The appellant answered the complaint by a general denial.

The cause was submitted for trial to a jury, who returned a verdict for the appellee. The appellant moved for a new trial; the motion was overruled, and judgment rendered for the appellee.

The overruling of the motion for a new trial is assigned as error.

There is a bill of exceptions in the record, which concludes with these words: "And this was all the evidence offered in the cause."

The appellee insists that the bill of exceptions does not purport to contain all the evidence in the cause, and that, for that reason, the question mainly discussed by appellant, as to whether the verdict is sustained by sufficient evidence, is not properly presented to this court for decision.

It appears from other statements in the bill of exceptions, that the appellee offered in evidence a warehouse receipt for wheat, which was objected to by the appellant, but whether it was read in evidence does not appear. The bill of exceptions refers to it in these words: "A copy of the receipt is filed herewith, marked 'Exhibit A.'" It is not otherwise referred to.

The bill of exceptions further states that "The plaintiff then introduced in evidence the summons and correspondence and letters in reference to the case, stating at the time that it was offered for the sole purpose of evidence of the value of wheat at the different times testified to, and to show that a demand had been made, and that the plaintiff had not been guilty of laches in bringing this suit. To the introduction of which the defendant objected upon the ground that the same was immaterial, irrelevant and improper; which was overruled. A copy of the letters thus introduced is hereto annexed, marked 'Exhibits B, C, E and F.'"

There is no other reference to the papers thus introduced in evidence than as above stated. No place is designated by the words "here insert," in the bill of exceptions, to indicate

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to the clerk where the papers should be inserted. Certain papers seem to have been annexed by the clerk to the bill of exceptions after the signature of the judge. But this did not make such papers a part of the bill of exceptions. In the case of *Sidener v. Davis*, 69 Ind. 336, the court says: "By section 343, it is made unnecessary to copy a written instrument or any documentary evidence into a bill of exceptions, 'if its appropriate place be designated by the words "here insert;"' but in this case there is no such place designated wherein the evidence should be copied, and no reference in the bill of exceptions to the evidence thus omitted in any other part of the transcript. There is no authority, therefore, in the bill of exceptions, by which the clerk can copy therein the omitted evidence. In the subsequent part of the transcript, where the omitted papers are copied, the clerk has indicated, by citing the page in the bill of exceptions, wherein they should have been inserted; but this is the act of the clerk, without authority of law or the authority of the judge given in the bill of exceptions."

This language applies to the bill of exceptions in this case. "We can not hold the bill of exceptions in this case as properly in the record."

Nor does the bill of exceptions purport to contain all the evidence. The words, "This was all the evidence *offered* in the case," are not equivalent to the words, "This was all the evidence given in the cause." *Goodwine v. Crane*, 41 Ind. 335; *Woollen v. Wishmier*, 70 Ind. 108; *Douglass v. State*, 72 Ind. 385.

The evidence not being in the record, we can not say that the verdict was not supported by the evidence.

The only other question discussed by the counsel for the appellant relates to the charge of the court. The bill of exceptions states that the following charge was the only one given:

"You are not concerned in determining anything but what is legitimately before you. I do not think, knowing you as I do, you will carry anything with you into your private room but what is proper, and you can answer to God for. I

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have no fears of prejudice. I have known men too long to have any fears of that kind. I have no fears but what you will do right between the parties."

This amiable expression of confidence in the prudence and impartial fairness of the jurors selected and accepted by the parties as triers of the cause was altogether harmless.

There is no available error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

79 264
124 219

No. 8894.

THE SINGER MANUFACTURING COMPANY v. EFFINGER.

FOREIGN CORPORATIONS.—*Answer in Abatement—Plea in Bar.*—In an action by a foreign corporation on a contract made with it, an answer under oath, that "the plaintiff had not complied with the provisions of an act of the General Assembly" respecting foreign corporations, lacks the precision and certainty of a plea in abatement, and, stating not facts, but a conclusion only, is insufficient to bar the action.

From the Ripley Circuit Court.

W. D. Willson and C. H. Willson, for appellant.

G. Durbin, for appellee.

ELLIOTT, C. J.—The court below sustained demurrers to two paragraphs of appellant's complaint, and this ruling is assigned as error. We do not deem it necessary to decide whether the paragraphs to which the demurrers were sustained are good or bad; for if good no harm was done appellant, as there were other paragraphs of the complaint, under which all the evidence that would have been competent under the paragraphs held bad could have been introduced.

The complaint is based upon a contract and bond executed by the appellee to the appellant. One of the paragraphs of

The Singer Manufacturing Company v. Effinger.

answer filed by the appellee is, omitting the merely formal parts, as follows: "The defendant says the plaintiff is a corporation, not incorporated under the laws of the State of Indiana, but is incorporated and organized under the laws of the State of New York; and that at the commencement of this action the plaintiff had not complied with the provisions of an act of the General Assembly of the State of Indiana, entitled 'An act respecting Foreign Corporations and their agents in this State.' Approved June 15th, 1852." The plea is verified.

The answer is in abatement, not in bar. In *The Walter A. Wood, etc., Co., v. Caldwell*, 54 Ind. 270, the question was very fully considered, and it was held that the failure of a foreign manufacturing corporation to comply with the statute would not bar, but would abate, the action. In *Daly v. The National Life Ins. Co.*, 64 Ind. 1, and in *The Singer Manufacturing Co. v. Brown*, 64 Ind. 548, the case cited is expressly approved. The rule applicable to pleas in abatement is a familiar one, and must govern in this instance. Pleas in abatement are required to be drawn with a high degree of precision and certainty, and this plea falls far below this requirement. But assigning to this answer the character of a plea in bar, it is bad. It states no substantive facts. It states a bare unsupported conclusion. There are many cases, scattered through our reports, holding that the allegation in actions against railroad companies, that "the road was not fenced according to law, is insufficient." *The Indianapolis, etc., R. R. Co. v. Bishop*, 29 Ind. 202; *The Pittsburgh, etc., R. W. Co. v. Keller*, 49 Ind. 211; *Pittsburgh, etc., R. R. Co. v. Brown*, 44 Ind. 409.

This rule is in accordance with a long settled principle of pleading. It is the duty of the pleader to state what acts his adversary has done or omitted to do, and leave it to the court to determine whether there has, or has not, been a compliance with the statute.

Judgment reversed.

Eberwine *et al.* v. The State, *ex rel.* Koster.

No. 7029.

EBERWINE *ET AL.* v. THE STATE, *EX REL.* KOSTER.

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REPLEVIN BAIL.—*Discharge of.—Motion.—Practice.*—A discharge from a recognizance of replevin bail may be obtained upon proper cause shown, by motion in the court which rendered the judgment.

SAME.—*Married Woman.*—A married woman is incapable of binding herself by a recognizance of replevin bail, and, having signed such contract, may be discharged therefrom on motion in the court where the judgment was rendered.

From the Knox Circuit Court.

F. W. Viehe and *R. G. Evans*, for appellants.

G. G. Reily, *W. C. Johnson*, *W. C. Niblack* and *S. W. Williams*, for appellee.

WOODS, J.—The appellants, Frederick G. and Eliza J. Eberwine, filed in the circuit court a motion for the release of said Eliza from a recognizance of replevin bail, alleging that on the 19th day of December, 1876, in a proceeding for bastardy in said court, the appellee recovered a judgment against Allen D. Eberwine for five hundred dollars, payable in specified instalments, and on the same day the said Eliza and one Matilda A. Daniel jointly and severally entered into a recognizance of replevin bail for the stay of execution on the judgment and for the payment thereof; that an execution had been issued and was in the hands of the sheriff to be executed, and that, at the time of signing the obligation, the said Eliza was and still is the wife of her co-plaintiff, and therefore had no capacity to bind herself or to encumber her property by entering into a recognizance of replevin bail. Wherefore, etc.

The point is made by the appellee that the proceeding should have been by complaint instead of by motion.

The record shows, however, that the relatrix appeared by her attorney, and, without making any objection to the form of procedure, admitted the facts to be true as stated; and, thereupon, "the court, being of opinion that said recognizance is valid, notwithstanding the facts aforesaid," overruled the

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motion and gave judgment for the appellee, to which ruling the appellants excepted.

Under these circumstances, the appellee ought, perhaps, to be held to have waived the right to raise the objection now interposed. We are, however, of the opinion that the proceeding by motion was permissible, if indeed it was not the more appropriate remedy. The entry of replevin bail became a part of the record and judgment in the cause; and any proceeding designed to set it aside or modify it must necessarily have been had in the same court; and there seems to be no good reason why it should not have been by motion.

The question remains, whether a married woman can enter into a binding recognizance of replevin bail.

The rule of the common law, except in so far as the same has been modified by statute, uniformly recognized as prevailing in this State, is "that a *feme covert* is incapable of binding herself by an executory contract, and that all such contracts made by married women, whether in writing or by parol, are absolutely void at law." *O'Daily v. Morris*, 31 Ind. 111; *Thomas v. Passage*, 54 Ind. 106; *The American Ins. Co. v. Avery*, 60 Ind. 566; *Williams v. Wilbur*, 67 Ind. 42.

In *Behler v. Weyburn*, 59 Ind. 143, it was held, and the doctrine has been repeatedly reaffirmed, that a married woman can not be bound by an estoppel *in pais* in reference to her real estate, because of the proviso in section 5 of the act touching the marriage relation, 1 R. S. 1876, p. 550, "That such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join." *The American Ins. Co. v. Avery*, *supra*; *Williams v. Wilbur*, *supra*; *Shilling v. Templeton*, 66 Ind. 585.

The one exception to this rule, which has been recognized, is a mechanic's lien, but this is upon the ground that "the law on the subject of mechanics' liens is the later law." *Shilling v. Templeton*, *supra*.

There is no inconsistency whatever between the provisions of the code of 1852 authorizing the entry of replevin bail

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upon judgments, and the proviso referred to. It was not the legislative intention that the "one or more sufficient freehold sureties," required upon a recognizance of replevin bail might be married women, infants or others under legal incapacity to make contracts.

It is insisted, however, that, under the provision of the code, section 427, that "Every recognizance of bail, taken as above provided, shall have the effect of a judgment confessed, from the date thereof, against the person and property of the bail," the appellant is estopped, as by a judgment, which can not be assailed indirectly, and hence that the inquiry whether she was under the alleged disability is not open.

In *Hinsey v. Feeley*, 62 Ind. 85, recognizing the doctrine of *Emmett v. Yandes*, 60 Ind. 548, "that a personal judgment against a married woman, where the coverture appeared upon the face of the complaint in the cause, was erroneous and might be reversed upon a complaint for review," this court held that "such a judgment is not void, and can not be attacked collaterally;" and hence that a suit to have the judgment declared a nullity could not be maintained.

We are not of the opinion, however, that this doctrine is applicable to the recognizance of replevin bail, which, though when entered into by a person not incapacitated from so doing, has "the effect of a judgment confessed against the person and property of the bail," nevertheless is not a judgment taken or rendered by a court or by a person exercising judicial functions, but is simply the act *in pais* of the recognizer, done under no solemnity or sanction, except the approval of a ministerial officer and from its very nature incapable of being appealed from or reviewed, as the judgment of a court may be.

A judgment confessed, however, is not valid unless entered with the consent of the holder of the cause of action; and, though such consent be inferable from the face of the record, it may be disputed and the fact inquired into collaterally. *Haggerty v. Juday*, 58 Ind. 154. And it will hardly be ques-

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tioned that if a clerk or sheriff in any case should accept as replevin bail an insolvent, or a person not a freeholder, an infant, or a *feme covert*, the judgment plaintiff, without waiting for a remedy against the officer, might move to have the recognizance set aside. But this could not be, if, like a judgment in every sense, the recognizance constitutes a complete estoppel. Estoppels must be mutual, and, if the judgment plaintiff is not concluded by the entry, neither should the bail be.

The case of *Hardenbrook v. Sherwood*, 72 Ind. 403, to which the appellee has referred us, is distinguishable in important particulars. The disability there alleged was unsoundness of mind, which had not been judicially determined, and of which, therefore, the world was not bound to inquire or take notice, and in the absence of actual notice had a right to indulge the contrary presumption. The person of unsound mind, but whose incapacity has not been judicially declared, has not the same unqualified right as a married woman or an infant (except as to necessities) to disavow and annul his contracts. If the rights of innocent third parties, who have dealt fairly and without notice of the disability, can not otherwise be preserved, he will not be permitted to disaffirm his obligation. *Musselman v. Cravens*, 47 Ind. 1; 1 Story's Eq. Jur., sections 227, 228. In the case referred to by the appellee, the rights of third parties had intervened. The land of the plaintiff had already been sold by virtue of his recognizance, and there was no offer to restore the purchaser to his original status. The case, besides, impliedly recognizes the fact that if the plaintiff's disability had been judicially declared before he entered into the recognizance, he would have been entitled to relief. But this would not be so if such recognizance has in all respects the effect of a judgment. *Hinsey v. Feeley*, *supra*.

Judgment reversed, with costs, and cause remanded with instructions to proceed in accordance with this opinion.

No. 7187.

BOCARD ET AL. v. THE STATE, EX REL. STEVENS, TRUSTEE.

TOWNSHIP TRUSTEE.—*Liability for Funds.—Ownership of Township Money.*—

When a township trustee receives money belonging to his township, he becomes technically the owner thereof, and only indebted to the township for the amount received. He is responsible to the township for such money to the same extent that a banker is for money deposited with him on general account, and hence is responsible to a much greater extent than if he were the mere agent, bailee or trustee of the township for the safe-keeping and disbursement of a specific fund.

SAME.—*Conversion.—Liability on Bond.*—A mere conversion of money received by a township trustee to his own use does not, of itself, amount to a breach of his bond; there must also be, as connected therewith or resulting therefrom, a failure on his part to pay out the money for which he is responsible, according to law, or to deliver it to his successor at the expiration of his term of office.

SAME.—*Failure to Make Report.*—The failure of a township trustee to make an annual report of the receipts and expenditures of his township does not render him liable on his bond, unless some injury resulted to the township or other party interested by reason of such failure.

SAME.—*Evidence.—Admissions as against Statutes.*—In an action upon the bond of a township trustee as against his sureties, the admissions or declarations of the township trustee, which are not a part of the *res gesta*, and made after the alleged breach of the bond, are inadmissible.

From the Harrison Circuit Court.

B. P. Douglass and *S. M. Stockslager*, for appellants.

L. Jordan, *W. T. Jones* and *S. J. Wright*, for appellee.

NIBLACK, J.—This was an action by the State, on the relation of Enoch P. Stevens, Trustee of Blue River School Township, of Harrison county, against John R. Stevens, a former trustee of such township, and Isaiah Stevens, Joseph P. Miles, Mathias Bocard and William E. Cole, as his sureties, on his official bond.

The complaint averred that the said John R. Stevens was, at the October election in 1872, elected trustee of Blue River township, in said county; that he gave the bond sued on, qualified and acted as such trustee until the close of his term in October, 1874, when he was succeeded by one Solomon

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Strange, who had been first duly elected and qualified; that the said Strange died on the 1st day of July, 1875, and was succeeded by one William Hancock, who was duly appointed for that purpose; that the said Hancock continued to act as trustee of said township until the 17th day of October, 1876, when he was succeeded by the relator, Enoch P. Stevens.

The breaches assigned were:

First. That during his term of office there had come into the hands of the said John R. Stevens several sums of money belonging to Blue River school township, the entire amount of which he had wrongfully and fraudulently converted to his own use.

Second. That the said John R. Stevens did not, at any time during his term in office, account to the board of commissioners of Harrison county, for all moneys received by him as trustee, and belonging to such school township, amounting to the aggregate sum of \$3,067.38, but to so account to said commissioners had wholly failed and refused.

Third. That, during his term of office, there came into the hands of the said John R. Stevens, as trustee, several enumerated sums of money, belonging to said school township, amounting in all to \$3,067.38; that said sum of money remained in his hands at the expiration of his said term of office, and, at that time, and ever since, he had failed and refused to pay over said sum of money to his successor in office.

The defendant John R. Stevens was not served with process, and did not appear to the action.

The remaining defendants, comprising all the sureties on the bond, interposed some objections to the sufficiency of the complaint, but their objections were all overruled. They then answered:

1. The general denial.
2. Payment by their principal, the said John R. Stevens, to his successor in office.
3. The statute of limitation.

After issue, the cause was submitted to the court for trial.

No. 7187.

BOCARD ET AL. v. THE STATE, EX REL. STEVENS, TRUSTEE.

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SAME.—Failure to Make Report.—The failure of a township trustee to make an annual report of the receipts and expenditures of his township does not render him liable on his bond, unless some injury resulted to the township or other party interested by reason of such failure.

SAME.—Evidence.—Admissions as against Statutes.—In an action upon the bond of a township trustee as against his sureties, the admissions or declarations of the township trustee, which are not a part of the *res gesta*, and made after the alleged breach of the bond, are inadmissible.

From the Harrison Circuit Court.

B. P. Douglass and *S. M. Stockslager*, for appellants.

L. Jordan, *W. T. Jones* and *S. J. Wright*, for appellee.

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The remaining defendants, comprising all the sureties on the bond, interposed some objections to the sufficiency of the complaint, but their objections were all overruled. They then answered:

1. The general denial.
2. Payment by their principal, the said John R. Stevens, to his successor in office.
3. The statute of limitation.

After issue, the cause was submitted to the court for trial.

Bocard *et al.* v. The State, *ex rel.* Stevens, Trustee.

Finding for the plaintiff, assessing the damages at the sum of \$619.60; motion for a new trial refused, and judgment against the defendants, the sureties, upon the finding.

While the sufficiency of the complaint as an entire pleading is not technically before us, the argument upon its sufficiency having been confined to the second breach assigned, upon the bond, the conclusion we have reached as to the ultimate disposition which ought to be made of the cause renders it proper that we shall express an opinion upon all the breaches assigned in the complaint.

By the law in force at the time the events set forth in the complaint occurred, two principal duties were devolved upon a township trustee concerning moneys which came into his hands by virtue of his office:

First. To pay out such moneys from time to time as the emergencies of the township might require, according to law.

Second. At the expiration of his term of office to deliver to his successor all moneys which might remain as an unexpended balance in his hands.

All other requirements concerning moneys in his hands were merely incidental to these principal duties. 1 R. S. 1876, p. 900, section 6; p. 902, section 12.

It has been held by this court, and it may now be accepted as the law of this State, that, when a township trustee receives money belonging to his township, he becomes in a certain technical as well as a general sense, the owner of the money so received by him, and only indebted to the township for the amount of the money which has thus come into his hands; that he is thereby made responsible to the township for the money received by him to the same extent that a banker becomes responsible for money deposited with him on general account, and hence to a much greater extent than if he were the mere agent, bailee or trustee of the township for the safe-keeping and disbursement of a specific fund. *Morbeck v. The State, ex rel.*, 28 Ind. 86; *Robbins v. Cheek*, 32 Ind. 328; *Rock v. Stinger*, 36 Ind. 346; *Shelton v. The State, ex rel.*, 53 Ind.

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331 ; *Linville v. Leininger*, 72 Ind. 491 ; *Brown v. The State, ex rel.*, 78 Ind. 239.

A mere conversion of money received by a township trustee to his own use did not, therefore, amount to a breach of his bond. There must also have been, as connected therewith or as resulting therefrom, a failure on his part to pay out the money for which he was responsible, according to law, or to deliver over the same to his successor at the expiration of his term. *Morback v. The State, ex rel.*, 34 Ind. 308 ; *The State v. Hebel*, 72 Ind. 361.

Nor did the failure of a township trustee to make an annual report of the receipts and expenditures of his township during the preceding year render him liable on his bond, unless some injury resulted to the township or other party interested, by reason of such failure.

It follows from what we have said that the first and second breaches assigned in this case, upon the bond, were not well assigned.

As we find the third breach in the record, it was somewhat inaptly constructed, but it alleged what appears to us to have been a substantial breach of the bond under the statute defining the duties of township trustee.

William Hancock was called as a witness for the plaintiff, at the trial, and, over the objection of the defendants, the sureties, testified that in December, 1875, several months after he had become township trustee, as stated in the complaint, he had a conversation with John R. Stevens, in which he, the said Stevens, admitted that there was still due from him to Blue River School Township, on account of school funds remaining in his hands, the sum of \$538.89, and the admission of that evidence was assigned as one of the causes for a new trial.

Brandt on Suretyship, at section 518, says: "Questions as to the admissibility and effect of evidence, which are peculiar to the relation of principal and surety, frequently arise, and may properly find a place here. As a general rule, where the

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suit is against a surety alone, admissions or declarations of the principal, which are not a part of the *res gestæ*, and which are made either before the surety became bound, or after the employment for which the surety became bound has ceased, or after there has been a breach of the contract on which the surety is liable, are not admissible in evidence."

The rule of evidence thus formulated by Brandt, is supported by other leading authorities, and ought, we think, to be recognized as the correct rule in actions against sureties alone. 1 Phillipps Ev. 525; 1 Greenl. Ev., section 187.

The averment of the complaint, that John R. Stevens' term of office expired in October, 1874, was sustained by the evidence. Consequently the admission testified to by Hancock was made more than a year after Stevens had ceased to be trustee of the township. Hancock was, therefore, permitted to testify in opposition to both the letter and spirit of the rule stated by Brandt, as above, and for that reason the judgment will have to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

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No. 7582.

SEARCY ET AL. v. THE PATRIOT AND BARKWORKS TURNPIKE
COMPANY ET AL.

GRAVEL ROAD.—*Assessments.—Constitutional Law.*—The act of March 2d, 1877, Acts 1877, Reg. Sess., p. 72, reviving the act of May 14th, 1869, and validating gravel road assessments made thereunder, in certain cases, is constitutional.

SAME.—*Illegal Assessments.—Act Not Curative.*—Said act of March 2d, 1877, is not curative in its provisions, and does not legalize or validate illegal or invalid assessments, but only such as had been made pursuant to the provisions of the gravel road act of May 14th, 1869.

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SAME.—*Judgment Conclusive.—Legislative Power.—Injunction.*—The judgment of a court of competent jurisdiction, perpetually enjoining the collection of certain gravel road assessments, is binding and conclusive upon all the parties thereto until the same is set aside, annulled or reversed by due course of law; and it is not in the power of the General Assembly to set aside or dissolve such injunction, or to authorize the collection of the assessments which the court had declared to be illegal and invalid.

From the Switzerland Circuit Court.

S. Carter, for appellants.

W. D. Ward and *T. Livings*, for appellees.

Howk, J.—In this case, the only question for decision in this court is this: Are the facts stated in the complaint of the appellants, the plaintiffs below, sufficient to constitute a cause of action in their favor and against the appellees?

The appellants' complaint, in this case, is so exceedingly long, that we will not attempt to give a summary even of all its allegations in this opinion. We will, however, state as briefly as we can the material and controlling facts, alleged in the complaint as constituting the appellants' supposed cause of action. This suit was commenced on the 31st day of October, 1878, in the court below, by the appellants, Stephen J. Searcy and Samuel Fisk, as plaintiffs, against the appellees, The Patriot and Barkworks Turnpike Company and Charles Robenstein as the treasurer of Switzerland county, Indiana, as defendants.

It appeared from the complaint in the case, that on the 9th day of October, 1873, the said Searcy and Fisk, and twenty-seven other named persons, had commenced a suit against the said turnpike company, and the then auditor and treasurer of said Switzerland county, in said court; the object of which said suit was, that certain assessments of benefits, made in August, 1870, against the plaintiffs therein, and their respective parcels of real estate, to aid in the construction of the road of said turnpike company, might be declared null and void, and clouds upon their respective titles which ought to be removed; and that the said auditor and treasurer of said

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county, and their respective successors in office, as well as the said turnpike company, might be perpetually enjoined from collecting the said assessments of benefits. Afterwards, on the 25th day of January, 1876, the plaintiffs in said suit filed a second paragraph of complaint, alleging therein substantially the same facts, and praying in substance for the same relief as in the original complaint. On the 3d day of February, 1876, the issues joined in said suit were tried by the court below, and a finding was made for the plaintiffs therein, that the matters stated in their complaint, to the effect that all the lands lying within one and one-half miles of the line of said turnpike on either side thereof, and within a like distance of each terminus thereof, had not been assessed with the benefits resulting thereto from the construction of said road, were true, and that the plaintiffs were entitled to the relief prayed for. Thereupon, on the day last named, by its judgment and decree of that date, the court below perpetually enjoined and restrained the said turnpike company, and the said county treasurer and his successors in office, from collecting or attempting to collect the said assessments of benefits, against the plaintiffs in said suit or their lands respectively, and the said county auditor and his successors in office, from placing the said assessments of benefits, or any part thereof, on the tax duplicate of said county, against the plaintiffs or their lands respectively.

After stating at length the proceedings had in said former suit, the appellants, Searcy and Fisk, alleged in their complaint, in the case at bar, that they were the same Stephen Searcy and Samuel Fisk, who were plaintiffs in said former suit, and in whose favor a perpetual injunction had been granted as aforesaid, against the collection of said assessments of benefits in aid of the construction of the road of said turnpike company; that, after the rendition of said judgment and decree, the said turnpike company had procured the appellee Gill, auditor of said county, to make a duplicate of said assessments of benefits, certified under his hand and seal of office,

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and to deliver the same to the appellee Robenstein, treasurer of said county, for collection; and that said Robenstein, as such treasurer, was then attempting to enforce the collection of said assessments of benefits. Wherefore the appellants asked that the said turnpike company, and the said Robenstein and his successors in office, should be forever enjoined from collecting any of the said assessments of benefits from the appellants, or either of them, or from their property; and that the said assessments, then on said duplicate against the appellants and their lands, should be declared and adjudged to be null and void, and for all other proper relief.

It is manifest, that the assessment of benefits, mentioned in the appellants' complaint, was attempted to be made under the provisions of the act of May 14th, 1869, authorizing the assessment of lands for plank, macadamized and gravel road purposes. Acts of 1869, Spec. Sess., p. 73; 3 Ind. Stat. p. 538. By an act approved March 13th, 1875, and declaring an emergency, the aforesaid act of May 14th, 1869, was unconditionally repealed. In *The Marion Township Gravel Road Co. v. Sleeth*, 53 Ind. 35, it was held, that, by the repeal of the statute authorizing the making of the assessments and the collection thereof, not only the remedy for the collection of the assessments, but also the lien, or right itself, was taken away. This case was approved and followed in the cases of *Bradley v. The Brandywine, etc., Turnpike Co.*, 53 Ind. 70; and *Webb v. The Brandywine, etc., Turnpike Co.*, 55 Ind. 441.

By an act approved March 2d, 1877, the said repealing act of March 13th, 1875, in so far as it repealed the aforesaid act of May 14th, 1869, was itself repealed and the latter act was revived to a certain extent and for certain expressed purposes. In *The State, ex rel., v. Stout*, 61 Ind. 143, the aforesaid act of March 2d, 1877, was held to be a valid and constitutional enactment; and to the same effect are the following later decisions of this court: *The Marion, etc., G. R. Co. v. McClure*, 66 Ind. 468; *Cook v. Fuson*, 66 Ind. 521; and *Brown v. The Eagle Creek, etc., G. R. Co.*, 78 Ind. 421.

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It will be seen from the allegations of the complaint in the case now before us, that in the former suit of the appellants and others against the said turnpike company and the auditor and treasurer of said county, notwithstanding the repeal of the act of May 14th, 1869, pending the litigation, the court below afterwards, on the 3d day of February, 1876, tried and determined said suit in favor of the appellants and their plaintiffs and against the said defendants therein. The ground of this decision, as stated in said complaint, was the invalidity and illegality of the said assessment of benefits.

It further appeared from said complaint, that, after the approval of the aforesaid act of March 2d, 1877, the said turnpike company procured the auditor of said county to prepare and certify a duplicate of said assessment of benefits, and to deliver the same to the treasurer of said county for collection; and that the appellee Robenstein, as such treasurer, was then attempting to enforce the collection of said assessment of benefits. We learn from the briefs of counsel, as well of the appellees as of the appellants, that this action was probably taken by the appellees, and by the auditor of said county, upon the theory that the aforesaid act of March 2d, 1877, is curative in its provisions, and that it legalized and validated the otherwise invalid and illegal assessment of benefits mentioned in the complaint. We are of the opinion, however, that this theory is erroneous and can not be maintained. This question was before this court and carefully considered in *The Marion, etc., G. R. Co. v. McClure, supra.* In delivering the opinion of the court in that case, WORDEN, C. J., said:

“Now, it is claimed by counsel for the appellants, that the act of 1877 operates as a *curative* statute, and renders valid assessments made prior to the repealing act of 1875, which were void or voidable for want of compliance with the provisions of the statute or statutes under which they were made. We, however, find nothing in the act that admits of such construction. There is nothing in the act that evinces such a legislative intent. The plain purpose of the act was to permit

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valid assessments, in the cases provided for, to be collected notwithstanding the repealing act of 1875, and not to validate and give life to assessments which were void, and which could not have been legally collected if the repealing act of 1875 had never been passed. Only such assessments are authorized to be collected as were made 'pursuant to the provisions of said act approved May 14th, 1869.' By this we understand that the assessments, in order to be rendered collectible, must have been made in accordance with, and not in contravention of, the provisions of said act of 1869."

In the case at bar, the appellees' counsel place much stress upon the expression, in the act of March 2d, 1877, that "such assessments are hereby declared to be valid and binding;" and their argument is, that the expression implies that the assessments referred to were, prior to the passage of said act, invalid and of no binding force. This may be conceded, as it seems to us, without impairing in any manner the correctness of our construction of the provisions of said act. The phrase, "such assessments," manifestly refers to the assessments previously mentioned in the act, as made "pursuant to the provisions of said act, approved May 14th, 1869." Taken in connection with the context, we think, that by the expression quoted and relied upon by appellees' counsel, the General Assembly evidently intended to provide and declare that assessments made pursuant to the provisions of the act of May 14th, 1869, prior to March 13th, 1875, in the cases contemplated in the act of March 2d, 1877, should be valid and binding and collectible, notwithstanding the repeal of said act of May 14th, 1869, under which said assessments were made, by the aforesaid act of March 13th, 1875.

We have considered the questions in this case, as they arise under the statutes referred to, without reference to the binding character and conclusive force of the judgment and decree in the former suit between substantially the same parties, and in relation to the same subject-matter, stated at length in the appellants' complaint. Without any extended examina-

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tion or discussion of the question, we may say generally that we are of the opinion that the appellees, and especially the turnpike company, were bound and concluded by the judgment and decree of the court below, in the former suit, from enforcing the collection of said assessment of benefits, or any part thereof, from the appellants and their co-plaintiffs, or either of them, or from the property of either of them, until such judgment and decree were set aside, annulled or reversed, by due course of law. It was not in the power of the General Assembly, while said judgment and decree remained in full force, to virtually dissolve and set aside the perpetual injunction thereby granted, and to authorize the collection from the appellants of the assessment of benefits, which a court of competent jurisdiction had declared to be illegal and invalid. *The Columbus, etc., R. W. Co. v. The Board, etc.*, 65 Ind. 427, on page 440, and cases cited.

Our conclusion is that the court erred in sustaining the appellees' demurrer to the appellants' complaint.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to overrule their demurrer to the appellants' complaint and for further proceedings not inconsistent with this opinion.

No. 8671.

BEAL v. BEAL.

79 220
136 614

MARRIED WOMAN.—Covenants in Deed.—Husband and Wife.—Promissory Note.—Consideration.—Conveyance.—Adverse Possession.—When a married woman takes a promissory note for a conveyance of her lands, with covenants of general warranty, in which her husband joins, and a portion of the lands described is at the time owned by a stranger in possession, so that the purchaser obtains neither possession nor title thereto, there is a partial failure of the consideration of the note to the extent of the value of that part of the land, notwithstanding the statute, 1 R. S. 1876, p. 363, section 6, which enacts that the wife shall not be bound by such covenants.

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PLEADING.—*Answer.*—*Practice.*—An answer which commences as being general but answers only a part, and in the conclusion purports to be pleaded only as an answer to such part, is not to be regarded as pleaded to the whole complaint, and is good on demurrer.

From the Madison Circuit Court.

C. D. Thompson, J. W. Sansberry and M. A. Chipman, for appellant.

H. D. Thompson, for appellee.

FRANKLIN, C.—Appellee sued appellant upon a promissory note. Appellant answered, and alleged in the third paragraph of his answer a partial failure of the consideration of the note. A demurrer was sustained to this paragraph of the answer.

The ruling upon the demurrer is the only question presented by counsel in this case.

This paragraph of the answer reads as follows: "The defendant for an amended third paragraph of his answer says: That he admits the execution of the note sued on, but says that the same was given for and in part consideration for the purchase price of the following real estate in Madison county, Indiana, to wit: The southeast quarter of section 18, in township 20 north, range 8 east. That the same was purchased from one Rebecca Beal, who on said day conveyed the same to defendant by deed of general warranty, containing full covenants of title; John Beal the husband of said Rebecca, joining her in said deed, a copy of which deed is filed herewith and made a part of this answer. And he avers that at the time of said sale and conveyance, the said Rebecca Beal was not the owner of all of said real estate, but that prior thereto she and her grantors had sold and conveyed ten acres off of the south end of the east half of said real estate to other parties, who had and still hold the possession thereof, and that this defendant did not and could not take possession of the same; and that said part of said real estate is of the reasonable value of one thousand dollars, and that, by reason of the premises hereinbefore stated, he has been damaged in the sum of one thousand dollars, and that the consideration of

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said note has wholly failed to said amount, and he offers to confess judgment for the residue. And asks for general relief."

The first objection to this paragraph of the answer is, that it purports to answer the whole complaint and only answers a part. While in the beginning it appears to be general, in the conclusion it is limited to a part, and offers to confess judgment for the residue. Taking the whole paragraph together, we think that it was intended only to be an answer of partial failure of consideration, and ought to be so regarded.

The second objection is, that Rebecea Beal was not bound by the covenants in her deed, and, as she was the payee and assignor of the note, this defence was not admissible, and for that reason counsel say the demurrer was sustained to this paragraph.

This objection raises the question as to whether it is a good defence to a note given in consideration of the purchase price of real estate, that the real estate was sold and conveyed with covenants of seizin and warranty by the payee, a married woman, the husband joining in the deed, and that the real estate at the time of the conveyance was owned and held and still is owned and held by, and in the adverse possession of, a third party, under a good title, and that the vendee and payor of the note was unable to and never had obtained possession of the real estate.

Where a warranty deed has been accepted by the purchaser of real estate, possession taken under the deed, and a note given for the purchase-money, so long as the purchaser holds the deed and such possession he can not, for the want or failure of title, defend against the payment of the note, for other than nominal damages. *Whisler v. Hicks*, 5 Blackf. 100 (33 Am. Dec. 454); *Bottomf v. Smith*, 7 Ind. 673; *Small v. Reeves*, 14 Ind. 163; *Shumaker v. Johnson*, 35 Ind. 33; *Jones v. Noe*, 71 Ind. 368.

If the covenant of seizin, embraced in the covenant of warranty is also broken, the defendant may plead a want of consideration.

In the case in 5 Blackf., *supra*, DEWEY, J., used the following language: "There could be no breach of the covenant

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of seizin, or that of right to convey, without a want of title of the vendor; but had either of these covenants been broken, there is no doubt but the defendant might have alleged that matter as a failure of the consideration of the note given for a part of the purchase-money."

In the case in 7 Ind., *supra*, DAVISON, J., used the following language: "The deed, it seems, contained a covenant of seizin; and if the vendor had no title to the premises, that covenant was broken immediately after it was executed, and the defendants may allege such breach as a failure of consideration." But in the later cases it has been held by this court that a breach of the covenant of seizin must occur as well as the breach of the covenant of title, in order to constitute the defence of failure of consideration.

In the case in 14 Ind., *supra*, we find the following language: "Where a deed is made and accepted and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on his covenants, while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of the defect of title. This is, in many of the cases, because the purchaser's possession, being under color of title, may continue undisturbed for twenty years, and thus become perfect and he be uninjured." And reference is made in support thereof to the cases of *Hannah v. Henderson*, 4 Ind. 174; *Reasoner v. Edmundson*, 5 Ind. 393; *Osborn v. Dodd*, 8 Blackf. 467. In the same case we find this further proposition: "Any adverse possession, but especially such as is alleged in this case, at the time of the conveyance, it seems, is an eviction, and under the conveyance made utterly void." See Rawle on Covenants for Title, 75, 268; *Bottorf v. Smith*, 7 Ind. 673.

If any interest whatever was conveyed by a defective title, and there was an eviction, a reconveyance was necessary. If there was no interest or title whatever conveyed, a reconveyance was not necessary. *Bottorf v. Smith*, *supra*.

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If this had been claimed to be the husband's land that was conveyed, we think there could be no question as to this being a valid defence. And can it make any material difference that the wife sold and conveyed the land and had the note made payable to her, instead of the husband having sold his land?

While the 6th section of chapter 82, 1 R. S. 1876, p. 363, provides that the wife shall not be bound by any of the covenants in her deed, and an action would not be sustained against her for a breach thereof, yet, we think her warranty deed ought to be regarded as something more than a mere quitclaim deed. A purchaser accepting a quitclaim deed contracts with a view to all the defects of title or right to possession. A purchaser who takes a warranty deed contracts for the property and the quiet and peaceable possession of the same, and not for the mere barren ideality of a defective or void title. And while the wife in this case could not be sued for the breach of the covenants of her deed, she and those claiming under her, ought in all good conscience to be estopped from claiming any advantage by her own wrong.

In the case of *Farley v. Eller*, 29 Ind. 322, it was held that a wife was estopped by her covenants in a fraudulent deed.

In the case of *Shumaker v. Johnson*, 35 Ind. 33, WORDEN, J., quotes extensively from the case of *Van Rensselaer v. Kearney*, 11 How. 297, in which quotation we find the following language in relation to a quitclaim deed: "A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time, and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view; and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an interest in fee, he must take precaution to secure himself by the proper covenants of title. But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of con-

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veyance. And therefore, if a deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least as far as to estop them from ever afterward denying that he was seized of the particular estate at the time of the conveyance.' After citing and discussing many authorities, the opinion proceeds as follows: 'The principle deducible from these authorities seems to be, that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument by way of recital or averment that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should forever thereafter be precluded from gainsaying it.'

The opinion of this court then proceeds: "We have quoted largely from the opinion in this case, because it puts the estoppel upon quite different ground from that assumed in many of the cases, and assimilates the principles that govern it to those governing ordinary estoppels *in pais*. The estoppel, in

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this view, is not made to depend upon the presence or absence of covenants. Perhaps a married woman, who executes a deed with covenants, say the covenant of seizin, or our statutory warranty, although not bound by the covenants as such, would be estopped on the principles above enunciated. We, however, intimate no opinion on the question." But in the case of *King v. Rea*, 56 Ind. 1, this court did intimate an opinion on this question, and clearly decided it, in the following emphatic language: "Although she is not bound by her covenants of warranty, we think she is estopped by her deed."

We thus conclude from the foregoing authorities, that a married woman's warranty deed ought to be, and is, something more than a mere quitclaim deed. And we see no good reason why a failure of consideration can not be pleaded against her or her privies, the same as against the husband. The defendant contracted with her for the land; he gave his note to pay for the land; he did not get the land; got no possession or the right to possession of this land; got nothing but a void warranty deed to this part that was then in the adverse possession of a third party, with a good title to the same. If this does not constitute a partial failure of consideration, it would be difficult to make one appear. In the general desire to protect married women's rights, it should not be extended to the encouragement and protection of unfair dealing. We, however, do not decide that the same defence could not be made to a note in a case where a quitclaim deed had been received.

We think the court below erred in sustaining the demurrer to this paragraph of the answer, for which error the judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is in all things, reversed, and that the cause be remanded with instructions to the court below to overrule the demurrer to the third paragraph of the answer, and for further proceedings. Costs against appellee.

Murray v. Williamson.

No. 8395.

MURRAY v. WILLIAMSON.

79	287
149	707

SUPREME COURT.—*Brief.—Time of Filing.—Dismissal.*—On failure by an appellant to file a brief within the time prescribed by Rule 14, the clerk is required to enter an order dismissing the appeal. Such rule applies as well to causes submitted by agreement as to those submitted on call, and as well to those appealed in the term of the trial court as to those appealed in vacation; and the fact, that the appellant has filed a brief since the expiration of the sixty days, is no reason why the appeal should not be dismissed.

From the Randolph Circuit Court.

I. P. Gray and *P. Gray*, for appellant.

A. Gullett, *A. O. Marsh*, *W. A. Thompson* and *J. Thompson*, for appellee.

WORDEN, J.—In this case an appeal was prayed for and granted in term, and the record, containing an assignment of error and joinder and an agreement of the parties to the submission of the cause, was filed in the office of the clerk of this court on December 30th, 1879, and thereupon the clerk entered the submission as of that date.

No brief for the appellant was filed until July 14th, 1880. On July 21st, 1880, the appellee filed a motion to dismiss the appeal, because no brief had been filed by the appellant within the time prescribed by the rule of this court.

This motion will have to prevail. Rule 14 of this court provides, that "Where a cause is submitted on call or by agreement, the appellant shall have sixty days in which to file a brief, and if not filed within the time limited, the clerk shall enter an order dismissing the appeal," etc. The rule applies as well to causes submitted by agreement as to those submitted on call, and as well to those appealed in term of the court below as to those appealed in vacation. The clerk should have entered an order dismissing the appeal at the expiration of sixty days from the submission, no brief having been filed; but this was, through inadvertence, as we suppose, omitted.

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But we must now order to be done what was then omitted. The fact that a brief has since been filed for the appellant is no answer to the appellee's motion. He has the right to have the appeal dismissed. Several cases have been dismissed under similar circumstances. The rule is easily complied with. A brief filed in compliance with it does not prevent the appellant from afterwards filing a more extended or elaborate one, if he wishes to do so.

The appeal is dismissed, at the costs of the appellant.

No. 8612.

MAYS v. HEDGES.

79 288
135 290

PLEADING.—*Argumentative Denial.*—*Harmless Error.*—An argumentative denial is not bad on demurrer, but if the general denial be also pleaded, to sustain the demurrer is a harmless error.

MARRIED WOMAN.—*Deed.*—*Acknowledgment.*—The deed of a married woman in which she joins her husband, conveying his lands, is good without acknowledgment; and if she hand the deed to the grantee, assuring him that the name signed thereto is her signature, thereby inducing him to accept it, she is bound by it.

DEED.—*Acknowledgment.*—A certificate of acknowledgment to a deed, made by the officer merely on the assurance of another that the party executed it, is a nullity.

EVIDENCE.—*Signature.*—Upon the trial of the issue, whether or not a married woman's signature to a deed, also executed by her husband, was made or authorized by her, and there is direct evidence *pro* and *con*, it is error to admit evidence showing that a subsequent purchaser bought in good faith and paid a full and valuable consideration.

From the Vigo Circuit Court.

D. C. Mitchell and *D. N. Taylor*, for appellant.

S. C. Davis and *S. B. Davis*, for appellee.

MORRIS, C.—The appellant sued the appellee, alleging in the first paragraph of her complaint that she is the owner in

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fee of the one undivided third part of the *west side* of the southwest quarter of section 8, township 10 north, of range 9 west, in Vigo county, Indiana, and that the appellee is the owner of the other two-thirds of said land; that they hold the same as tenants in common, and praying that partition be made of the same.

In the second paragraph of her complaint the appellant states that she is the surviving widow of Johnson B. Mays, who was in his lifetime the owner of the real estate described in the first paragraph of the complaint; that as such widow she owns the undivided one-third of said real estate, she never having joined her husband, Johnson B. Mays, in the conveyance of the same; that on the 4th day of March, 1876, said Johnson B. Mays sold and conveyed said land to John V. Carr; that said Carr and wife, on the 1st day of April, 1876, mortgaged said land to the *Ætna Insurance Company*, of Hartford, Connecticut, and that on the 26th day of September, 1876, said company foreclosed said mortgage, and, on the 10th day of September, 1877, caused said land to be sold on the decree foreclosing said mortgage; that said company bought said land and took a certificate of purchase for the same from the sheriff of Vigo county; that said company sold and assigned said certificate of purchase to the appellee, to whom the sheriff of said county, after the expiration of a year from the day of sale, conveyed it; that the deed to said Carr, executed by the appellant's husband, was never executed by her. She prays that her title to one-third of said land may be quieted, etc.

The appellee appeared and demurred to each paragraph of the complaint. The demurrers were overruled. He then answered in three paragraphs. The first is the general denial; the second states the facts as they are stated in the second paragraph of the complaint, except that it avers that the appellant joined with her husband in the deed conveying said land to said Carr, and it described the land as one hundred acres off the

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west side of the southwest quarter of section 8, township 10 north, of range 9 west.

The third paragraph of the answer describes the land as it is described in the second paragraph; alleges that the appellant's husband, Johnson B. Mays, was the owner of the land; that on the 4th day of March, 1876, Johnson B. Mays sold and conveyed said land to said John V. Carr for the sum of \$4,500; that on said day Mays, the husband of the appellant, and said Carr, procured one Samuel Bayes to write out a deed for said land; that Bayes was auditor of said county; that Mays desired Bayes to let him have a deed and go out into the country to his residence and get his wife to sign said deed, bring it back and he take the acknowledgment; but this Bayes declined to do, but said that if Mays and Carr would go and get the appellant to sign the deed, and Carr attest it as a witness, he would write out a certificate of acknowledgment and sign it; that said Mays and Carr went to the house of said Mays, and the appellant, on being asked for the deed, handed it to said Carr, saying it was all right; that when it was so handed to Carr it was signed by the appellant and her husband; that he asked her to trace with a pen her signature to the deed in his presence, but that she said it was unnecessary to do so, that that signature was hers. The auditor then attached to the deed his certificate of acknowledgment that said *Ætna Insurance Company* accepted from said Carr a mortgage on said land, believing his title thereto to be valid. The title of the appellee is then stated, as in the second paragraph, and he asks that the appellant may be held to be estopped to set up any claim to said land, and that his title thereto may be quieted.

The appellant demurred to the second and third paragraphs of the answer separately, on the ground that neither stated facts sufficient to constitute a defence to the action. The demurrers were overruled. The appellant then replied to the answer by a general denial.

The cause was submitted to a jury for trial. Verdict for the appellee. The jury found, in answer to an interrogatory.

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that the appellant did not acknowledge the deed in question before any officer authorized to take such acknowledgment.

The appellant moved the court for a new trial. The motion was overruled and judgment rendered upon the verdict in favor of the appellee.

The errors assigned are :

1st. That the court erred in overruling the demurrer to the second paragraph of the appellee's answer.

2d. That the court erred in overruling the demurrer to the third paragraph of the appellee's answer.

3d. That the court erred in overruling the appellant's motion for a new trial.

It is insisted by the appellant that the second paragraph is bad, because it amounts to the general denial. If such is the fact, it may have been unnecessary, but it could hardly be said to be bad for that reason. There might be no error in sustaining a demurrer to it, for, as the general denial is in, it could do no harm. And for the same reason there could be no error in overruling the demurrer, as the general denial would let in all proof against the appellant that could be offered under the special denial. There was no error in overruling the demurrer to the second paragraph of the answer.

It is objected to the third paragraph of the answer, that it is bad, because it amounts to the general denial, and because it purports to answer the whole complaint, but does not. It is not, as we have seen, bad for the first reason. Nor does it fail to answer the whole complaint. If true, the appellant, at the time of the death of her husband, had no interest in the land in controversy. She and her husband had conveyed it to Carr. But it is insisted that the deed to Carr was never validly acknowledged. We agree in this with the appellant. The certificate attached to the deed by auditor Bayes, upon the statement of the grantee, Carr, and not upon the act or admission of the appellant, was void. Such an acknowledgment is entirely unauthorized, and can have no effect whatever. But is the deed of the appellant, she being at the time

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a married woman, without an acknowledgment, inoperative and void? The appellant's counsel argues with much earnestness and plausibility, that, upon a fair construction of the statute upon the subject, such deed should be held to be void. Were the question presented to us for the first time the argument would be entitled to much consideration. But nearly twenty years ago these provisions came before this court for construction, and it was held that section 4 of the act in relation to conveyances, 1 R. S. 1876, p. 362, was to be construed in connection with sections 11, 18 and 23, and when so construed must be regarded as directory merely; that, if otherwise construed, "it would alike affect the validity of deeds executed by persons not under disability, as well as by married women." This construction has been acquiesced in and acted upon for too long a period to be now disturbed by judicial construction. We must, therefore, hold the deed set forth in the third paragraph of the answer to be valid, though not acknowledged.

The appellant insists upon his motion for a new trial on the ground that the verdict is not sustained by sufficient evidence, and because the court erred in admitting testimony offered by the appellees, in excluding testimony offered by the appellant, and in refusing to instruct the jury as requested by her.

Counsel for the appellant say that the evidence did not show that the deed purporting to be executed by her to Carr was ever legally acknowledged by her; that, for this reason, the evidence did not justify the verdict. Such proof, as we have already held, was not necessary, the deed being valid without an acknowledgment. We have examined the testimony carefully, and we think there was evidence legally tending to support the verdict. We can not, as has been often held by this court, disturb the verdict on the weight of the evidence.

It is also insisted by counsel, that the court erred in permitting the appellee to read in evidence the deed from the appellant to Carr without proof of its execution, she having denied

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its execution under oath. Were the fact as it is assumed to be, the objection to the evidence should have been sustained. But this was not the case. The pleadings alleged, and it was conceded, that the husband of the appellant had executed the deed. Carr testified, before the deed was offered in evidence, that the appellant delivered to him the deed with her signature to it, saying at the time that she had signed it. This testimony was clearly sufficient to authorize its admission in evidence.

The appellee was permitted to testify, over the objection of the appellant, as follows: "That he had purchased said land in question for a valuable consideration, and had paid for the same in full, and had purchased it in good faith without any knowledge or notice that the plaintiff held, owned or claimed any interest in and to said real estate."

The real question in controversy between the parties was, whether or not the appellant had joined with her husband in the execution of the deed to Carr, through whom the appellee derived title. If she had joined in the execution of that deed, she could not question the title of the appellee, whether he had paid for the land or not, or whether he purchased in good or bad faith from the *Ætna Insurance Company*. On the other hand, if she had not executed the deed to Carr, then, though the appellee had paid the full value of the land and purchased in the best of faith, she was entitled to recover one-third of it. It follows that the testimony of the appellee, as to his good faith and want of notice, was irrelevant and impertinent; nor can we say that it was not prejudicial and injurious to the appellant. Regarding the appellee as an innocent purchaser for the full value of the entire estate paid to the husband of the appellant, the jury might have been led, unwittingly and unconsciously, to give to the testimony introduced by the appellee, a preponderating force which, in the absence of such testimony, they would not have considered it entitled to. The testimony was calculated to make an impression upon the minds of the jurors favorable to the

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appellee. We can not say that it did not influence the minds of the jury. Where it is clear that irrelevant testimony could not have influenced the jury adversely to the party against whom it is admitted, it may be said to be harmless, but not otherwise. Carr, the grantee, alone testifies directly to the appellant's admission of the execution of the deed; he procured a certificate of acknowledgment to be improperly attached to the deed, and admits that the appellant had told him that she would not sign the deed. She testifies that she did not execute the deed, told him she would not sign it, and never acknowledged that she had signed it. Other witnesses were called, and about an equal number testified in support of Carr and of the appellant. We think that under these circumstances the court erred in admitting that part of the testimony of the appellee above quoted.

We have examined the instructions of the court and think there was no error in them.

No cross errors have been assigned, and we can not, therefore, pass upon the demurrer to the complaint. It may be doubtful whether it contains a sufficient description of the land.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the cost of the appellee.

No. 8744.

THE STATE, EX REL. MANCHESTER SCHOOL TOWNSHIP, v.
HAYNES.

TOWNSHIP TRUSTEE.—*Receipt.*—*Deficit.*—*Defalcation.*—An incoming township trustee can not absolve his predecessor from liability for money in his hands, so as to prevent the township from maintaining an action for it, by falsely charging himself with such funds and by falsely receipting to his predecessor for the amount of his deficit.

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SAME.—Settlement.—Fraud.—Receipt.—In such case, an alleged settlement of his deficit with the board of commissioners, by the use of a receipt procured from his successor by a gross and inexcusable fraud, constitutes no defence against an action by the township.

SAME.—Sureties.—Township.—A township trustee can not bind his sureties, or conclude the township, for money not actually received from his predecessor, but receipted for to him upon his representation that it was a long standing deficit and had been receipted for as such by himself and his predecessors. *Query.*—In such case, is the incoming trustee himself concluded by his false receipt fraudulently procured, and by his report to the board of commissioners charging himself with the amount?

From the Dearborn Circuit Court.

H. D. McMullen, D. T. Downey and M. A. Spooner, for appellant.

NEWCOMB, C.—The complaint alleged that the appellee was the trustee of Manchester township, Dearborn county, Indiana, from October —, 1870, to October 18th, 1872; that as such trustee he received from his predecessor in office, and from the treasurer of said county, divers sums of money belonging to said school township; that a part of said money, to wit, the sum of four hundred and nine dollars and ninety-six cents, was not paid out and expended by the defendant on account of said township, nor did he pay the same over to his successor in said office, but appropriated and converted the same to his own use, and had ever since failed, neglected and refused to account for the same.

The defendant filed an answer of three paragraphs, the first of which is not numbered, and the others are respectively numbered 3 and 4, and will be referred to by such numbers.

The first paragraph averred generally, that, before the termination of his said office of trustee, he fully accounted for all said funds, to the proper lawful authorities.

3. That at the — session of the board of commissioners of Dearborn county, in the year 18—, he, as such trustee, made his report of and concerning said funds, and the disposition thereof, to said board of commissioners, pursuant to the statute; that said board approved of said report and of the

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doings of the defendant therein reported, embracing and covering the funds in the complaint mentioned, and the disposition thereof made by the defendant as such trustee; that he fully accounted for and paid over to his successor in office all the school funds remaining in his hands at the expiration of the term of his office; and that his successor in office assumed and charged himself with the same.

4. That on October 20th, 1872, at the time of the expiration of his office, defendant accounted to William Dunn, who then became and was his successor in office as such trustee, for said sum of \$409.96, and afterwards, on October 20th, 1873, said Dunn, as such trustee, made his report to the board of commissioners of Dearborn county, wherein and whereby he charged himself with that amount had and received by him, as such trustee, from the defendant; and that said board of commissioners accepted and approved said report with such charge of said sum of money therein contained.

The plaintiff replied in two paragraphs. The averments of each are substantially the same, and we refer to those of the first paragraph only, to wit: That the defendant, falsely and fraudulently represented to his successor in office that he never received from his predecessor in said trust said sum of \$409.96; but that for a long time prior to his acceptance of said office a deficit had existed in the funds in the hands of each successive incumbent, and that said sum of \$409.96 was the amount of said deficit, and that he had receipted to his predecessor for an amount including that sum, without in fact receiving the same; that it had been and was a custom of each incumbent to receipt to his predecessor for such sum, and such person would in turn be credited by his successor for the same without an actual payment thereof.

The reply then averred that said statement was false; that no such deficit existed when the defendant assumed said trust; that he received the full amount for which he receipted to his predecessor, but did not pay over the same to his successor, his payment being just \$409.96 less than the amount with

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which he was charged; that the successor of the defendant, relying upon said statement and in ignorance of its falsity, receipted to him for the full amount with which the defendant stood charged, but that said sum, being the amount of said deficit, had not since said time been in the proper funds of said township; that said statements were false and fraudulent and were so intended, and by said means and not otherwise the defendant procured a receipt from his successor in office, and upon said false statements and the presentation of said receipt, he procured the settlement with the board of commissioners alleged in his answer.

The defendant demurred to the replies; his demurrers were sustained, and, the plaintiff electing to stand on said replies, there was final judgment on demurrer for the defendant.

We have no brief on behalf of the appellee, but are informed by the appellant's counsel that the circuit court sustained the demurrers to the replies on the authority of *The State, ex rel., v. Prather*, 44 Ind. 287. The court overlooked a palpable distinction between the replies in the Prather case and in the case at bar. There Valhowe, the successor of Prather, had charged himself with an amount, that it was ascertained Prather was delinquent, on the promise of the latter, that if Valhowe would report said money to the board of county commissioners as in his hands, he, Prather, would immediately pay the same, which he had failed to do, etc. The several promises and statements alleged in the reply to have been made to Valhowe were charged to have been falsely and fraudulently made, but the court said of said reply: "It attempts to set up fraud by statements as to what should or would be done hereafter. This was palpably bad. Fraud can only be predicated on an existing or an alleged existing fact, and not on a promise to be complied with in the future." It was further held in that case, that as Valhowe had charged himself with the amount for which Prather and his sureties were sued, and had reported to the county commissioners that he had said funds, the defendants were

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discharged from liability. In *The State, ex rel., v. Grammer*, 29 Ind. 530, it had been held that the statement of a township trustee, in his annual report to the county board, of the amount of money in his hands, was conclusive against the trustee and his sureties in a suit on his official bond. But those cases have been overruled so far as sureties on bonds of public officers are concerned, by the later cases of *Lowry v. The State, ex rel.*, 64 Ind. 421; *Ohning v. The City of Evansville*, 66 Ind. 59.

As, according to the cases last cited, the sureties of Dunn, on his bond, would not be liable for the sum with which he had falsely charged himself for the benefit of the appellee, can the latter drive the township to an action against Dunn alone, supposing the latter to be concluded by his report to the commissioners?

It must follow that an incoming trustee can not absolve his predecessor from liability for money in his hands, so as to prevent the township from maintaining an action for it, by falsely charging himself with such funds, because the law requires the security, not only of the responsibility of the trustee, but of two freehold sureties in addition. 1 R. S. 1876, p. 900, section 5.

We hold, therefore, that the acts of Dunn in charging himself with the deficit of the appellant, and falsely receipting to the latter for said funds, were void as against the township for want of power on Dunn's part to bind either the township or his own sureties thereby; and that the alleged settlement with the county board, having been confessedly procured by a gross and inexcusable fraud, was no defence against the action of the appellant.

The court below erred in sustaining the demurrers of the appellee to the first and second paragraphs of the reply of the appellant, for which cause the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and the same is, hereby reversed, at the costs of the appellee, and that said cause be remanded for further proceedings, in accordance with said opinion.

 Moore, Adm'r, v. Lynn et al.

No. 8825.

MOORE, ADM'R, v. LYNN ET AL.

PRINCIPAL AND SURETY.—*Promissory Note.*—*Vendor's Lien.*—*Deposition.*—

Harmless Error.—In an action upon notes, signed by A. and B., the latter "as security," and to enforce a vendor's lien, it is a harmless error to suppress a deposition which alone tends to prove that B. signed as principal and not as security, in order to show that the vendor's lien was not waived, where the jury find that the notes have been paid.

SAME.—*Harmless Instruction.*—An instruction, which directs the jury to find for the defendants in case they find B. signed as surety, is harmless where they find that the notes have been paid.

INSTRUCTION.—*Harmless Error.*—*Interrogatory.*—An erroneous instruction will not reverse a case, where the answer to an interrogatory propounded to the jury shows that the party was not injured by the instruction.

From the Ohio Circuit Court.

A. C. Downey and J. B. Coles, for appellant.

W. S. Holman, for appellees.

BEST, C.—The appellant, as the administrator of the estate of Joel Lynn, deceased, brought this action against the appellees to recover a judgment upon two notes alleged to have been executed by John R. Lynn and one John A. Harpham, to the decedent, on the 3d day of April, 1867, one for \$4,400, payable five years from date, and the other for \$9,000, payable twelve years from date, and to enforce a vendor's lien upon certain real estate described in the complaint. The notes were signed "John A. Harpham, security," but it was averred that he in fact executed them as principal.

The appellants answered:

1st. General denial;

2d. Payment; and,

3d. That, after the execution of the notes, various suits were commenced against the decedent by his creditors, and in consideration of John R. Lynn's agreement to procure the dismissal of said suits, to pay the sum of \$8,547.95 to his creditors and to pay all his debts except the sum of \$1,320, which he did, the decedent agreed to release and surrender said notes

79	299
149	39
151	668
79	299
154	578

Moore, Adm'r, v. Lynn *et al.*

as fully paid, which he did on the 22d day of May, 1867. A copy of a written release, reciting these facts, accompanied the answer.

A reply was filed, and the issues thus formed were submitted for trial to a jury, who returned a general verdict for the appellees. They also found, in answer to certain interrogatories propounded to them by both parties, that the decedent executed the release recited in the answer upon a valid consideration; that he voluntarily surrendered the notes as paid on the 22d day of May, 1867, and that nothing was due or to become due upon the notes, or either of them.

The appellants moved for a new trial, which was overruled, and final judgment was rendered for the appellees. From this judgment the appellant appeals, and assigns as error the order of the court in overruling the motion for a new trial.

It is insisted that this ruling was wrong, because the court had erred in suppressing the deposition of John A. Harpham, and in giving instruction number four to the jury.

The deposition of John A. Harpham, one of the makers of the notes, had been taken by the appellant, and upon the appellees' motion it was suppressed. The substance of this witness' testimony was, that he and John R. Lynn, the other maker of the note, were partners in the purchase of the land and in the execution of the notes; that he executed them as principal and not as the surety of his co-maker.

Instruction numbered four directed the jury that if they found that John A. Harpham executed the notes as the surety of John R. Lynn, to find for the defendants.

Conceding that the court erred in suppressing the deposition and in giving this instruction to the jury, yet, we think, the errors were harmless, as the appellant was not injured by them.

The utmost that the deposition tended to prove was that the vendor's lien was not waived by the manner in which Harpham had signed the notes. This fact, however, was immaterial, as the notes had been paid, and, therefore, the exclusion of this testimony did no harm, because its admission could

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have done no good. It would have been otherwise, had it tended to defeat the issue upon which the jury found.

Nor did the instruction injure the appellant, as it appears that the jury found for the appellees upon the ground that the notes had been paid, and not upon the ground that Harpham had executed the notes as surety. An erroneous instruction will not reverse a case, where it appears from an answer by the jury to an interrogatory, that the appellant was not injured by the error. *Manning v. Gasharie*, 27 Ind. 399, see page 413; *Uhl v. Harvey*, 78 Ind. 26.

For these reasons, we think the motion for a new trial was properly overruled, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the appellant's costs.

No. 8974.

KALER v. HISE, ADM'R, ET AL.

PROMISSORY NOTE.—*Principal and Surety.*—*Extension of Time.*—*Release of Surety.*—*Consideration.*—*Interest.*—A contract for an extension of time for the payment of a note by the principal and payee, made upon a valuable consideration and without the consent of the surety, will release him, and the payment of interest in advance for a definite period is such valuable consideration.

From the Harrison Circuit Court.

S. J. Wright, for appellant.

W. N. Tracewell and R. J. Tracewell, for appellees.

ELLIOTT, C. J.—Appellant's complaint is upon a promissory note executed by Alfred D. Osborne in his lifetime as principal, and the appellees Finley and Reising as sureties. The defence is that the appellant, the payee of the note, for a

Hansford v. Van Auken, Adm'r.

valuable consideration extended the time of payment without the consent of the sureties.

It is well settled that a contract for the extension of time made upon a valuable consideration, and without the consent of the sureties, will release them. The evidence in this case shows the payment of interest in advance for a definite period, and the payment of interest in advance is a valuable consideration. The endorsement on the note reads thus: "Received on the within note ten dollars interest with the understanding that the time is to be extended one year from this date, December 26, 1878-9." The evidence sustained the defence pleaded.

As to the appellee Reising, there is some conflict upon the question whether he signed before or after the extension of the time. The finding of the trial court settles the question against appellant. There is evidence supporting the conclusion that extension was granted after Reising had signed the note, and we can not disturb the finding of the court upon this point.

Finley does not defend upon the ground that an additional obligor became a party to the note upon the procurement of the payee, and without his knowledge, and we need decide nothing upon this question.

Judgment affirmed.

79	303
136	135
79	302
138	450
79	302
162	212

No. 8329.

HANSFORD v. VAN AUKEN, ADM'R.

ALIMONY.—Decree.—Judgment.—Jurisdiction.—A decree awarding alimony is a judgment upon which an action may be maintained in the same court in which it was rendered.

ADMINISTRATOR.—Legal Capacity to Sue.—Complaint.—A plaintiff's legal capacity to sue as administrator can be questioned only by a sworn answer. His complaint need not make profert of his letters.

Hansford v. Van Auken, Adm'r.

JUDGMENT.—*Court of Superior Jurisdiction.—Pleading.—Presumption.*—A complaint upon a judgment of a court of superior jurisdiction need not aver that the judgment was "duly rendered." Its validity is presumed.

From the Porter Circuit Court.

T. J. Merrifield, for appellant.

W. Johnston and — *Pagin*, for appellee.

FRANKLIN, C.—Appellee, as administrator of the estate of Mary A. Hansford, sued appellant on a judgment for alimony in a divorce case theretofore rendered in the same court.

Appellant demurred to the complaint, which demurrer was overruled. He then filed an answer in denial and a special paragraph. Appellee demurred to the special paragraph, which demurrer was sustained, and appellant reserved exceptions to the foregoing rulings. Trial by court, finding for appellee, motion for a new trial overruled, exceptions reserved, and judgment on the finding.

Errors have been assigned in this court upon the rulings on the demurrers and the motion for a new trial.

Both of these demurrers present the same question, and that is, can an action be maintained upon a judgment rendered in the same court in which the action is brought?

Appellant's counsel admit that a suit can be maintained upon a foreign judgment, or, in a superior court, upon a domestic judgment rendered in an inferior court; but insist that it can not be maintained upon a judgment rendered in the same court or upon a domestic judgment rendered in a court of like jurisdiction. Upon this question we have been referred to a number of authorities from other States. But this question so far as can be, in this State, appears to be well settled by the decisions of this court.

In the case of *Davidson v. Nebaker*, 21 Ind. 334, WORDEN, J., uses the following language: "A judgment is a debt of record, and we have no doubt an action will lie to recover such debt, whether the judgment be a foreign or a domestic one, although the plaintiff might have a remedy on the judg-

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ment, in the court where it was rendered, by execution or otherwise." And a number of authorities are cited in support thereof.

In the case of *Gould v. Hayden*, 63 Ind. 443, on p. 448, Howk, C. J., in rendering the opinion of the court, quotes the foregoing decision approvingly, and adds: "The judgment plaintiff, of course, controls his judgment. He may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment; but the very freedom with which this may be done, *ad infinitum*—and we know of no law or legal principle which would prevent its unending repetition," etc. The opinion then shows that the old was merged into the new judgment. See authorities therein cited.

In the case of *Palmer v. Glover*, 73 Ind. 529, Howk, C. J., cites from and approves the above named two former decisions, and adds that the plaintiff can not only recover the original judgment with interest thereon, but in addition thereto all the costs which he recovered in the former action, and in addition to all that the interest on the costs. Thus we find that this question has been definitely settled in this court, and against the views of appellant.

The next objection to the complaint is, that it does not show authority in the plaintiff to sue.

Appellant sued as administrator, and it is not necessary to make his letters of administration a part of the complaint. The character in which he sued could not be questioned unless it was denied by a pleading under oath. *Kelley v. Love*, 35 Ind. 106.

It is not objected that the complaint contains no averment that the judgment was duly rendered. Acts of a superior tri-

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bunal are valid, without an averment of their validity. *Waltz v. Borroway*, 25 Ind. 380.

It is further urged that this was a decree and not a judgment, and therefore no suit could be maintained upon it.

In Freeman on Judgments, section 434, the following language is used: "In the United States, 'We lay it down as a general rule that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity, which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record of the other.'" See authorities therein cited. And, as in this State, where the distinction between actions at law and suits in chancery are abolished, this doctrine becomes more peculiarly applicable. In the case at bar it was both a decree and judgment, a decree for a divorce and a judgment for alimony. This suit is only brought upon the judgment for alimony, which is the same as any other ordinary judgment, and forms no exception to an action being maintained upon it.

The reasons stated in the motion for a new trial are, that the finding of the court was not sustained by the evidence, and was contrary to law.

We have examined the evidence, and think it sustains the finding of the court, and that the finding is not contrary to law.

We find no error in this record.

The judgment below ought to be affirmed. *Hansford v. Van Auken*, ante, p. 157.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things affirmed, at appellant's costs.

The P., C. and St. L. Railway Company *et al.* v. The Town of Elwood *et al.*

79	306
137	450
79	306
153	189

No. 8626.

**THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY
COMPANY ET AL. v. THE TOWN OF ELWOOD ET AL.**

COSTS.—Judgment.—Injunction.—Where a judgment is rendered for the costs of "suit laid out and expended, taxed at \$ —," the omission to fill the blank is immaterial and affords no cause for enjoining the collection of the judgment.

SAME.—Taxation of.—Practice.—The taxation of costs is a ministerial and not a judicial act, and, under section 38 of the fee and salary act of 1875, clerks of the courts were authorized to tax fees as their services were rendered, and this authority extended to services rendered by any other person in the several courts.

From the Madison Circuit Court.

N. O. Ross, for appellants.

NIBLACK, J.—On the 22d day of January, 1878, in a suit then pending in the Madison Circuit Court, in which the Pittsburgh, Cincinnati and St. Louis Railway Company was plaintiff, and the Town of Elwood and Ramsey Moore, its marshal, were defendants, that court rendered a judgment restraining and enjoining the defendants from collecting certain taxes which had been assessed upon the taxable property of said plaintiff in the Town of Elwood, and against the defendants, for the costs and charges by the plaintiff in that "suit laid out and expended, taxed at \$ —." On the 25th day of November, 1878, Jesse L. Henry, as the clerk of that court, issued an execution against the property of the defendants, and upon that judgment for the costs, which it is claimed had accrued up to that date, and delivered the same to Thomas J. McMahan, as the sheriff of the proper county. The execution was accompanied by a fee bill, or itemized and certified statement of the costs taxed against the defendants, amounting in the aggregate to the sum of \$55.70.

This was an action by the Town of Elwood and Ramsey Moore, the defendants in the former suit, against the Railway Company and Jesse L. Henry and Thomas J. McMahan,

The P., C. and St. L. Railway Company *et al.* v. The Town of Elwood *et al.*

above named, to enjoin the collection of the judgment for costs, rendered as above set forth, upon the theory that such judgment was void, because of the blank space left in it for the amount of costs, apparently thereafter to be filled up before the record of it was signed by the judge who caused it to be entered. The court tried the cause, and upon the production of the judgment and execution in evidence, and some other merely formal proof, made a finding for the plaintiffs, and, over a motion for a new trial, entered judgment against the Railway Company and the said Henry and McMahan, perpetually restraining and enjoining them, and all others acting under their authority, from enforcing the collection of said judgment for costs, either by execution or otherwise.

The question for decision is, was the finding of the court sustained by sufficient evidence?

Under our system of jurisprudence, the taxation of costs has always been a ministerial and not a judicial act, and officers entitled to charge costs have been authorized to tax such costs, from time to time, as the services for which they may be taxed shall be rendered.

By section 38 of the act of March 12th, 1875, concerning fees and salaries, which was in force at the time the judgment in the original action was rendered, clerks of all courts were authorized to tax all fees as the services were rendered. 1 R. S. 1876, p. 478. This authority extended to services rendered by any other persons in the several courts.

In this State the usual and better practice has always been to render judgment generally for costs in favor of the party entitled to recover the same, leaving it to the clerk to tax the costs which have accrued or may thereafter accrue in the action, from the books, records and papers in his office, but reserving to the court the power to re-tax such costs, and make general orders concerning the same when a proper case has been presented for the exercise of such a power.

If, therefore, the blank in the original judgment, as to the amount of costs to be recovered, had been filled with a spe-

The City of Crawfordsville v. Smith.

cific sum, all that pertained to such specific sum would have been surplusage merely, and would not have added anything to the validity of the judgment. The omission to fill the blank was consequently an immaterial omission, affording no cause for enjoining the collection of the judgment. *Palmer v. Glover*, 73 Ind. 529.

Our conclusion is that the finding of the court was not sustained by the evidence.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 8847.

THE CITY OF CRAWFORDSVILLE v. SMITH.

CITY.—Negligence.—Leaving Dangerous Excavation in Street.—Damage.—

Where a horse takes fright and runs away and is injured because of the negligence of a municipal corporation in leaving a dangerous excavation in a street unprotected, an action may be maintained against the corporation, if the driver of the horse exercised due care and skill in driving and managing it.

*SAME.—Streets.—*A municipal corporation is charged with the duty of maintaining its streets and highways in a reasonably safe condition for travel.

*NEGLIGENCE.—Intervening Agency.—*Where the negligence of the defendant is the cause of an injury, an action will lie, although there may have been some intervening agency.

From the Montgomery Circuit Court.

E. C. Snyder, for appellant.

G. W. Paul, J. E. Humphries, J. Wright and J. M. Seller, for appellee.

ELLIOTT, C. J.—The material facts stated as the cause of action are these: Appellant is a municipal corporation; one of its streets, called College street, runs up to the brink of an excavation twenty-five feet in depth; on each side of this ex-

79	308
138	573
79	308
143	428
79	308
145	639

The City of Crawfordsville v. Smith.

cavation College street is graded and gravelled, and is open for travel and is travelled, to a point within a yard of the steep banks of the cut; that appellant has not constructed a bridge over the excavation, nor in any way guarded or protected it, but has negligently suffered it to remain open and unguarded; that on the night of the 6th day of March, 1880, appellee was driving along College street, using due care and skill, when his horse took fright, wheeled around, threw him from the buggy, ran away and into the excavation and was killed.

The contention of appellant is that the action can not be maintained, because the negligence in leaving the excavation unguarded is not the proximate cause of the injury complained of. The general rule undoubtedly is that an action will not lie, in cases of the class of which the present is a member, unless the negligence is shown to be the proximate cause of the injury. It is not difficult to state, or to understand, the rule, but its proper application to particular cases is sometimes a delicate and difficult task.

The appellant's counsel relies upon decisions of the courts of Maine and Massachusetts, and brings to our attention the following: *Bliss v. Wilbraham*, 8 Allen, 564; *Titus v. Northbridge*, 97 Mass. 258; *Fogg v. Nahant*, 98 Mass. 578; *Babson v. Rockport*, 101 Mass. 93; *Moulton v. Sanford*, 51 Me. 127. The decisions of the courts of these States can not exert any material influence upon the case, for the reason that they rest upon peculiar statutory provisions. *Brookville, etc., Co. v. Pumphrey*, 59 Ind. 78.

The case of *Baldwin v. Greenwoods T. P. Co.*, 40 Conn. 238, is strongly in point in appellee's favor. It was there held that a town was liable for injuries sustained by a horse taking fright, running away and falling from a defective bridge. It was there said: "Nor will the fact that the horse of the plaintiff was uncontrolled for some distance before the injury, change or in any way affect the liability of the defendants. The statute laws of our State impose upon towns and corporations the duty to keep their highways and bridges

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with sufficient railings in suitable repair. This is a positive duty, and the safety of the travelling community requires that it should be rigidly enforced." This case is fully approved in the later case of *Ward v. The Town of North Haven*, 43 Conn. 148. The doctrine of the cases cited is that of the Supreme Court of Vermont. In *Hodge v. Town of Bennington*, 43 Vt. 450, it was said: "But there has been a long and unbroken line of decisions in this State, that 'if the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road, conspiring with some accidental cause, the defendants are liable.'" *Hunt v. Pownal*, 9 Vt. 411. Another New England court, that of New Hampshire, holds the same doctrine. *Winship v. Enfield*, 42 N. H. 197; *Kelsey v. Glover*, 15 Vt. 708. The New York cases declare a like rule. *Ring v. City of Cohoes*, 77 N. Y. 83; *Kennedy v. Mayor*, 73 N. Y. 365; *Clark v. Union Ferry Co.*, 35 N. Y. 485; *Roadway v. Briggs*, 37 N. Y. 256. The subject has had careful investigation from the courts of Pennsylvania, and has received the same solution as that given in the cases to which we have referred. *Hey v. Philadelphia*, 81 Pa. St. 43; *Township of Newlin v. Davis*, 77 Pa. St. 317; *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. St. 276. In Iowa the same rule is established. *Manderschid v. City of Dubuque*, 25 Iowa 108. This is also the doctrine of the courts of Illinois and Missouri. *Lacon v. Page*, 48 Ill. 499; *Chicago v. Gallagher*, 44 Ill. 295; *Joliet v. Verley*, 35 Ill. 58; *Hull v. Kansas City*, 54 Mo. 598. We think the rule declared in the cases we have cited is sound, and that it is in harmony with the general current of our own decisions.

It is firmly established by the adjudged cases in our own reports that a municipal corporation is charged with the duty of maintaining its streets and highways in a reasonably safe condition for travel. *City of Delphi v. Lowery*, 74 Ind. 520; *City of Indianapolis v. Dougherty*, 71 Ind. 5; *City of Logansport v. Dick*, 70 Ind. 65; *Grove v. The City of Ft. Wayne*, 45 Ind. 429.

Chase v. Ball.

This duty is owing to all who have a right to use the highway, and who in using it exercise ordinary care and prudence. The right to recover for injuries resulting from a neglect of this duty can not be defeated upon the ground that some accident concurred with the defective condition of the highway in producing the injury. It is well settled that where the negligence of the defendant is the cause of the injury an action will lie, although there may have been some intervening agency. *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166.

These settled principles lead to the conclusion, that where a horse takes fright and runs away and is injured because of the negligence of a municipal corporation in leaving a dangerous excavation in a street unprotected, an action may be maintained against the corporation, provided, of course, the driver of the horse exercised due care and skill in driving and managing it.

Judgment affirmed.

No. 7355.

CHASE v. BALL.

MORTGAGE.—*Rents and Profits.—Married Woman.—Satisfaction of Decree.*—

It is competent for a married woman, her husband joining with her, to mortgage as well the rents and profits of her real estate, as the real estate itself, for the purpose of securing not only an outstanding debt, but the costs of foreclosure and of the insurance of the mortgaged premises. And where such mortgage is foreclosed, and the premises sold for the payment only of the mortgage debt and interest, the mortgagee and purchaser will be entitled, as against the mortgagor, to the rents and profits of the mortgaged premises, during the year allowed for redemption, for the payment of such costs and insurance, and, until the same are paid, the mortgage and decree will not be *functus officio*, or satisfied.

From the Tippecanoe Superior Court.

H. W. Chase, F. S. Chase and F. W. Chase, for appellant.

B. W. Langdon, for appellee.

Chase v. Ball.

Howk, J.—In this case, the appellee sued Daniel O'Conner and James S. Maderia, in a complaint of a single paragraph, wherein she alleged in substance, that on the 16th day of February, 1877, she leased by parol to said O'Conner and Maderia, for a term of one year and for a rent of thirty-three and one-third dollars per month, payable monthly, that part of lot number 8, particularly described, in the city of Lafayette, in Tippecanoe county, Indiana; that the said O'Conner and Maderia went into the possession of said premises under said lease, and had since been and then were in possession thereof, under the terms aforesaid, and that the monthly instalments of rent, falling due on the 16th days of February and March, 1878, were due and unpaid. Wherefore, etc.

The said O'Conner and Maderia appeared and answered in the nature of a bill of interpleader, admitting that the rent in suit was due and unpaid, and bringing the same into court; but they alleged that the appellant Frederick S. Chase, without any collusion with them, claimed that he had become the owner of the demised premises and demanded said rent from them, and they asked that the appellant Chase might be substituted as the defendant in the appellee's action in their stead, and that the court would determine which of the two, the appellee or the appellant, was entitled to said rent.

Thereupon the court ordered that the appellant, Chase, be substituted as the defendant in the appellee's action, in the room and stead of the former defendants therein; and the said Chase appeared and filed his answer in denial of the appellee's complaint, and also his cross complaint. The appellee demurred to said cross complaint upon the ground that it did not state facts sufficient to constitute a cause of action; which demurrer was sustained by the court, and to this decision the appellant excepted. The appellant then filed a verified petition for the appointment of a receiver to collect the rents of said demised premises; to which petition the appellee's demurrer, for the alleged insufficiency of the facts therein, was sustained by the court, and an exception was entered to this

Chase v. Ball.

decision. Judgment was rendered for the appellee for the amount of said rent, and the clerk was ordered to pay over to her the money paid in by said O'Conner and Maderia; to which said order the appellant, Frederick S. Chase, at the time excepted.

In this court the appellant, Chase, has assigned as errors the following decisions of the Superior Court:

1. In sustaining the demurrer to his cross complaint;
2. In sustaining the demurrer to his petition for the appointment of a receiver;
3. In overruling his motion for the appointment of a receiver; and,
4. In ordering the payment of the money in court to the appellee.

In his cross complaint the appellant said that, on the 25th day of August, 1876, he, the appellant, commenced an action in said superior court against one James H. Matthews, assignee of Gerald D. Gernon, a bankrupt, John F. McHugh and Julia McHugh, his wife, Robert B. Ball and John S. Williams, for the correction and foreclosure of a mortgage made by said Gernon and John F. McHugh, on February 18th, 1876, upon the same real estate described in appellee's complaint, and certain other real estate, all of which real estate had theretofore, on November 15th, 1875, been sold and conveyed by deed by Robert B. Ball and the appellee, his wife, to said Gernon and John F. McHugh; that the defendants in said suit to correct and foreclose said mortgage were duly summoned and appeared to the action; that on May 5th, 1877, the appellant filed in his said suit a supplemental complaint making the appellee a defendant thereto, by the name of Julia A. Ball, which he averred was her true name, in which supplemental complaint he charged that said Julia A. Ball, the appellee herein, claimed some interest or estate in the mortgaged real estate, including the real estate for the rent of which she sued in this action; that in said supplemental complaint the appellant further charged that all the rights of the

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appellee herein were subordinate to the appellant's rights ; that the appellee herein was duly summoned to answer therein ; that such proceedings were thereafter had in said suit as that, on October 18th, 1877, a judgment and decree were rendered by said court in favor of the plaintiff therein, the appellant in this case, for the correction of said mortgage, and that the appellant became and was entitled to collect the rents of all the mortgaged real estate, including that described in the appellee's complaint herein.

A copy of said judgment and decree is set out in, and forms a part of, the appellant's cross complaint in this cause, from which it appears that, on the trial of the appellant's said suit for the correction and foreclosure of his said mortgage, the court found, among other things, that it was the agreement and intention of the parties thereto that the mortgage should contain the following stipulation, to wit: "Said Frederick S. Chase, as such trustee, may collect the rents of the real estate herein described and apply the same to the payment of the taxes and insurance upon the property and the residue to said promissory notes;" that said stipulation was omitted from the mortgage by mistake and inadvertence, and that the appellant was entitled to the rents of the mortgaged real estate. It further appeared, that, upon its finding, the court adjudged and decreed, *inter alia*, that the appellant was entitled to all the rents of said mortgaged real estate.

After setting out such copy of said judgment and decree, the appellant further alleged in his cross complaint, that said judgment and decree were never appealed from nor in any way annulled or set aside ; that all the appellee's right, title or interest in and to said real estate was acquired by her by deed of conveyance from the said McHugh, and said Matthews, assignee in bankruptcy of said Gernon, after the execution of said mortgage to the appellant, and prior to the filing of his said supplemental complaint and to the rendition of said judgment and decree ; that, on December 1st, 1877, an order of sale, duly certified, was issued on said judgment and decree

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to the sheriff of Tippecanoe county, who by virtue thereof, on December 29th, 1877, offered and sold according to law the premises described in the appellee's complaint herein to the appellant, for six thousand dollars, and delivered to him a certificate of such sale, as required by law; that the said premises had not been redeemed from such sheriff's sale thereof to the appellant, and he then held said certificate of sale; that the said premises were not worth said sum of \$6,000, nor more than \$5,000; that the other mortgaged real estate was not worth what the appellant bid it off at, by several hundred dollars; that the taxes on all said real estate were in arrears to the amount of several hundred dollars, and none of said real estate was productive except that described in appellee's complaint; and that the appellant was entitled to all said rents, which were needed to pay taxes, costs and insurance. Wherefore the appellant said that he was entitled to the rents of the real estate described in appellee's complaint herein, accrued and to accrue, and that appellee was estopped from claiming the same; and he demanded judgment accordingly, and for all other proper relief.

We are of the opinion that the facts stated in his cross complaint were sufficient to show that the appellant was entitled, as against the appellee, to the rents in controversy in this action. Ordinarily, no doubt, under the provisions of the act of June 4th, 1861, providing for the redemption of real property, or of any interest therein, from sales on execution or order of sale, the judgment debtor would be entitled to the possession of the property sold, and the rents thereof, during the year allowed by law for the redemption of such property, from the sheriff's sale thereof. Acts of 1861, Spec. Sess., p. 79, section 2; 2 R. S. 1876, p. 220, section 2, note a. This right of the judgment debtor to the possession of real property, sold by the sheriff, and, in the event of his non-redemption thereof from such sale, his liability to the purchaser for its reasonable rents and profits during the year for redemption, have been recognized and acted upon by this

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court in a number of cases. *Powell v. De Hart*, 55 Ind. 94; *Wilson v. Powers*, 66 Ind. 75; *Graves v. Kent*, 67 Ind. 38.

It may be conceded that the appellee, in the case now before us, in the absence of the stipulations to the contrary in the corrected mortgage and the decree thereon, set out in appellant's cross complaint, would have been entitled to the possession of the mortgaged premises and to the rents thereof in controversy in this suit, and during the year allowed by law for the redemption of said premises from the sheriff's sale thereof to the appellant. But it seems to us that the stipulations of the mortgage and decree, to the effect that the appellant was entitled to the rents of the mortgaged premises and might collect such rents and apply the same to certain purposes, under the allegations of the cross complaint, were binding on the appellee and conclusive against her right, and in favor of the appellant's right, to the rents in controversy. Some stress is placed, by appellee's counsel, on the provision of the decree, that the appellant should have and recover the mortgage debt *only* of and from the mortgaged premises. In view, however, of the further provision of the decree, that the appellant might collect the rents of said mortgaged premises, and apply the same to the payment of the taxes and insurance on said premises, we are of the opinion that it was the intention, as well of the court as of the parties to the decree, that the appellant should have and recover his debt of and from the mortgaged premises, freed from any claim thereon on account of taxes or insurance, in so far as the rents of said premises would pay off and discharge such claims.

It was competent for the appellee, her husband joining with her, to mortgage as well the rents of her real property, as the property itself, and for and during the year allowed her by law for the redemption of such property from the sheriff's sale thereof, as well as for and during any other period of time. It was also competent for the court, with all the parties before it, to enforce such mortgage by its judgment and decree,

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not only against the mortgaged premises, but also against the rents thereof. It is said, however, by the appellee's counsel, that, by the sheriff's sale of the mortgaged premises to the appellant, for the amount of principal and interest, as alleged, the judgment and decree were completely satisfied and were thereafter *functus officio*. It is clear, we think, that this result would not follow, under the allegations of fact in the cross complaint. The proceeds of a sheriff's sale of property, under an execution or order of sale, must be applied, *first*, by law, to the payment of the accrued costs and expenses of such sale. Where, as alleged in this case, the amount of the principal and interest constitutes the proceeds of sale, it is manifest that the judgment and decree will not thereby be completely satisfied or thereafter become *functus officio*.

But, aside from this, we are of the opinion, that, inasmuch as it was stipulated both in the corrected mortgage and in the judgment and decree thereon, that the appellant might collect the rents of the mortgaged premises, and apply the same to the payment of the taxes and insurance thereon, it can not be said that such judgment and decree were completely satisfied and had performed their expected functions, in the face of the allegation that the taxes on said premises were largely in arrears. As we have seen, the appellant alleged in his cross complaint, that he was entitled to all the rents of said premises, which were needed to pay taxes, costs and insurance, and that the taxes were in arrears to the amount of several hundred dollars. In the suit for the foreclosure of the mortgage, in which suit the appellee and her husband were defendants, and bound by the judgment and decree of the court therein, it was found, adjudged and decreed by the court, that the appellant was entitled to the rents of the premises, and might collect and apply the same to the payment of the taxes and insurance upon the property, and the residue to the payment of the mortgage debt. These allegations were admitted to be true, by appellee's demurrer to appellant's cross complaint; and they show very clearly, as it seems to us, that, as against

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the appellee, the appellant was entitled to recover the rents in controversy.

The court erred in sustaining appellee's demurrer to appellant's cross complaint.

This conclusion renders it unnecessary for us to consider or decide any question arising under either of the other alleged errors. As the year for the redemption of the property from the sheriff's sale thereof has long since expired, the appointment of a receiver has ceased to be a question of any importance in this case.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the demurrer to the cross complaint, and for further proceedings in accordance with this opinion.

No. 8120.

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79	318
130	429
79	318
148	681

JUDGMENT.—*Misprision.*—*Motion to Correct Not Demurrable.*—*Practice.*—A motion to correct misprisions in the entry of a judgment is not the proper subject of demurrer.

SAME.—*Power of Court to Correct.*—*Valuation Laws.*—*Rate of Interest.*—When the contract on which a judgment was rendered was such as to require it, the judgment may be so corrected as to be executed without relief from appraisement laws, and as to draw a particular rate of interest.

SAME.—*Supreme Court.*—A judgment may be corrected in respect to misprisions in the entry of it after it has been affirmed on appeal by the Supreme Court.

From the Huntington Circuit Court.

J. C. Branyan and C. W. Watkins, for appellant.

W. H. Coombs, J. Morris, R. C. Bell, L. P. Milligan and A. Moore, for appellees.

WOODS, J.—The appellant moved in writing for the correc-

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tion of a judgment theretofore rendered in his favor in the court below, showing that the judgment was rendered at the December term, 1875, of the court, upon a promissory note executed by the appellees on the 13th day of May, 1875, whereby five months after said date they promised to pay to the order of the plaintiff, at the Citizens Bank of Huntington, Indiana, \$2,500, without relief from valuation or appraisal laws, with interest annually at ten per cent. until paid; a copy of which note was filed with the complaint as the cause of action, and the verdict of the jury and the judgment of the court in favor of the plaintiff were based thereon; but that the clerk of the court, by inadvertence and misprision in making up the record, so entered the judgment as that it contains no order for collection or enforcement without relief from valuation or appraisal laws, and draws six per cent. interest only; that the appellees appealed from the judgment to the Supreme Court, which affirmed the same, and thereafter, and not before, did the appellant discover the errors and omissions of the clerk in entering the judgment.

The court sustained a demurrer to this motion.

It is manifest, upon the facts stated in the motion, which, for the purposes of this appeal we assume to be true, that the judgment was wrong in the respects specified, and that, upon the face of the record, without resorting to other evidence, it was possible to make the proper corrections. That it is competent for the court in such cases to make the corrections prayed for, see *Miller v. Royce*, 60 Ind. 189, and cases cited.

Besides, the motion was not the proper subject of demurrer. *Jenkins v. Long*, 23 Ind. 460; *Hebel v. Scott*, 36 Ind. 226; *Bales v. Brown*, 57 Ind. 282; *Latta v. Griffith*, 57 Ind. 329. If, however, a right result had been reached, it would be no cause for reversing the judgment, that it was rendered on demurrer, instead of on motion to reject or dismiss.

The fact that the judgment had been appealed from by the appellees, and had been affirmed by the Supreme Court, presumably at the instance of the appellant, constitutes, as it seems

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to us, no bar to the petition or motion for correction ; no more, indeed, than the original entry of the judgment, which, in the same sense, is presumed to have been entered at his instance.

Judgment reversed, with costs, and cause remanded with instructions to overrule or strike out the demurrer, and to proceed to dispose of the motion upon its merits.

 No. 8347.

STUDABAKER ET AL., EX'RS, v. LANGARD ET AL.

FRAUDULENT CONVEYANCE.—Husband and Wife.—Notice.—Execution.—Judgment.—Assignment.—Mortgage.—Vendor and Purchaser.—In an action to subject lands to the payment of a judgment against L., the facts found specially were, that on January 3d, 1874, L. and wife reconveyed the lands to H., the vendor of L., who held a mortgage for \$6,000 purchase-money, and H., at the request of L. and wife, then gave the wife a title bond, conditioned for a deed when she paid H. \$7,000, which was the original purchase price. H. credited her with \$1,000 which L. had paid on the original purchase. H. paid nothing for the conveyance to him. The intention of L. (of which H. had notice) was to defraud the plaintiffs and other creditors, but as to the wife's intention or notice of her husband's intention the finding was silent. The judgment was rendered a few days after the giving of the title bond to the wife, and an execution thereon was levied on the lands, October 22d, 1874. L. had no other property subject to execution. L. furnished his wife \$300 which she paid on the purchase by her from H., but all other payments by her thereon were of her own money—about \$500. After the levy of execution the wife assigned title bond for \$7,500 to C. who assumed her indebtedness to H. and paid or secured to her the balance. C. had no knowledge or notice of any claim of the plaintiffs against L. and wife. The conclusion of law was against the plaintiffs.

Held, that a failure to find that the wife had notice of the fraudulent intent of her husband must, on exception to the conclusion of law, be deemed equivalent to a finding of that matter against the plaintiffs, and that L.'s wife was a *bona fide* purchaser.

Held, also, that her assignee, even with notice, would take free from any claim of the plaintiffs.

Held, also, that the levy of the execution before the purchase by C. was not actual or constructive notice to L.'s wife or to him.

79	320
143	304
79	320
144	007
147	539

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From the Allen Circuit Court.

L. M. Ninde and T. E. Ellison, for appellants.

W. H. Coombs, J. Morris, R. C. Bell, W. G. Colerick, H. Colerick and T. W. Colerick, for appellees.

ELLIOTT, C. J.—This case comes to this court upon a special finding of facts, upon which a conclusion of law was stated by the court. The material facts stated in the finding are, in substance, these: On the 19th day of January, 1874, appellants' testator recovered judgment against Joseph Langard for \$1,000, an execution issued thereon on the 22d day of October, 1874, and on that day was levied upon the land in controversy. The land was bought by said Joseph Langard December 6th, 1873, for \$7,000, of this sum \$1,000 was paid at the time of the purchase, for the remainder of the purchase-money nine promissory notes were executed, and these were secured by mortgage. The deed executed to Langard and the mortgage executed by him were duly recorded. On the 3d day of January, 1874, Langard and wife reconveyed the land to Thomas B. Hedekin, and the latter, at the request of Langard and his wife, executed a "title bond" to Victorine Langard, wife of Joseph Langard, agreeing to convey to her by deed the said land upon payment to him of \$7,000; that the \$1,000, paid by Langard at the time of his purchase, was allowed and credited to the said Victorine. That Hedekin paid no consideration to Joseph Langard and that the conveyance by the latter to the former was for the purpose of defrauding appellants' testator, but that Hedekin had no intent to defraud any person by said transaction. That Hedekin did not surrender the notes or mortgage executed to him by Langard. That neither the deed to Hedekin nor the bond to Victorine Langard has ever been recorded. That Hedekin knew of the said claim against Joseph Langard when the last named deed and bond were executed, and knew also of the pendency of the action in which the judg-

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ment of appellants' testator was recovered, and was informed by Langard when he, Hedekin, received the conveyance from him, that he, Langard, would not pay the said claim. That after the execution of the bond Joseph Langard paid \$300 to his wife which was used by her in paying Hedekin; that all other payments were made with her own money. That on the 13th day of February, 1875, Victorine Langard sold and assigned the bond executed to her by Hedekin to Peter Certia; that Certia agreed to pay said Victorine for such assignment the sum of \$7,500, and did pay \$800 at the time it was made and executed his promissory notes for \$1,500, the sum due Victorine, and that he assumed and agreed to pay the sum due Hedekin upon the original purchase. That Certia had no knowledge or notice of any claim against the Langards, but that he purchased in good faith. It is also stated in the special finding, that Joseph Langard had no other property out of which the claim could be made, at the time the aforesaid transactions took place, nor did he have when this action was commenced.

Appellants insist that they were entitled to judgment subjecting the real estate in controversy to the lien of the judgment obtained by their testator against Joseph Langard, and that the court erred in finding in favor of the appellees.

Victorine Langard is not a party to this action. There is nothing in the special finding showing that she had any knowledge of the claim of appellants' testator, nor is there anything showing any fraudulent intent upon her part. The absence of a fact essential to the success of a party who has the burden of proof is, in effect, a finding against him upon that point. *Ex Parte Walls*, 73 Ind. 95, cases cited on p. 110; *Stropes v. The Board, etc.*, 72 Ind. 42:

We must, therefore, treat the finding as showing that when Victorine Langard received the bond from Hedekin, on the 3d day of January, 1874, she had no notice of her husband's fraudulent design, and that she acted in good faith. Indeed, this is the ordinary presumption, for fraud is never presumed.

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It appears, too, that she was not a mere volunteer. When she received the bond from Hedekin, there was no lien upon the land and she was not, therefore, chargeable with constructive notice. Had she obtained a deed, she would certainly have been entitled to be regarded as a *bona fide* purchaser, with the right to hold and convey as such. The judgment subsequently obtained would not have been a lien upon the land in her hands. The appellants' testator had, when the bond was executed to Victorine Langard by Hedekin, no lien upon the land, nor any interest, legal or equitable, therein. He was a mere general creditor of Joseph Langard.

Leaving out of consideration the facts which we have stated and the rules of law to which we have referred, counsel argue that Certia had notice when he purchased, because the execution had been levied on the land prior to the purchase by him. This position can not be maintained. If Victorine Langard had acquired a good title then she could have conveyed one. This would be so even though she conveyed to one who had notice. *Sharpe v. Davis*, 76 Ind. 17. The fact that Certia purchased after an execution had been levied, would not have defeated his title, if it be true that his grantor was herself a purchaser in good faith. The judgment which furnished the foundation for the execution was the highest source to which appellants' claim of right could rise, and this was lower than Victorine's purchase, for that was anterior to the judgment. We can not, therefore, accept as correct appellants' theory, that, as Certia bought after the execution was levied, that fact alone subordinates his rights to those vested in appellants by the judgment against Joseph Langard.

The character of the title acquired by Victorine Langard exerts an important and controlling influence. If she acquired all the rights of a *bona fide* purchaser, then this point must be ruled against appellants. If she did not, then there is much force in appellants' argument, that, as Certia bought after the execution had been levied, he is to be deemed a purchaser with notice. Back of this, however, lies the controll-

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ing question : Was Victorine Langard a *bona fide* purchaser? The only infirmity in her title is that she held by an executory contract, and not by deed. She was not guilty of any fraud. She paid a consideration, and there was no purchase-money due the execution debtor when she parted with title. If the fact that she received a bond for a deed and not a deed is, as appellants insist, sufficient to deprive her of the character of a *bona fide* purchaser, then there would be ground for holding that Certia did not acquire a right paramount to that created by the levy of appellants' execution.

If the vendor of land were asserting a right to his lien, or if some person owning a prior equity were contesting the question, there would be much less difficulty in solving the legal problem. But the case is altogether different. Whatsoever rights the appellants' testator acquired in the specific property were such as his judgment supplied. Prior to the rendition of the judgment he had no interest in the land; he was but a creditor, with a general right to subject by legal process the property of the debtor to the payment of his debt. We do not think the case of *Amory v. Reilly*, 9 Ind. 490, in point. That was a case where a vendor who had executed a bond for title sought to enforce a lien for purchase-money against the land, after it had passed by assignment of the bond, into the hands of a third person who had no notice of the lien. It was rightly held that the rule, that a vendor could not enforce his lien against a purchaser without notice, did not apply where the vendor had not parted with title. In the case of *Sergeant v. Ingersoll*, 7 Pa. St. 340, it was said that "the rudimental principle of equity that he who purchases an imperfect or inchoate title must stand or fall by the case of his vendor, has never been shaken;" and this is a terse statement of a well known rule, in which we entirely concur. The rule, however, is not applicable to such a case as the present; nor was it so applied in the case from which we have quoted. As we shall hereafter see, the rule stated supplies the appellants no foundation for the case made by the special

finding, but supplies rather a foundation for an adverse theory. The case of *Sergeant v. Ingersoll*, 15 Pa. St. 343, decides that the purchaser of a legal title, having notice that the estate is affected by other interests than those of the vendor, is bound to inquire into the extent and terms of those interests, and that possession puts the purchaser upon inquiry. This doctrine, it is plain, has no application here.

One who purchases an imperfect title is unquestionably put upon inquiry, and may be charged with all knowledge that a reasonable inquiry would have obtained. It may be conceded that Certia was bound to inquire as to Victorine Langard's title, and that the inquiry would have resulted in full information. The extent of this information, as the special finding shows, is, that Mrs. Langard bought without notice and in good faith. The fullest inquiry would not have disclosed any wrong on her part or any flaw in her title. The question, it must be borne in mind, is not whether Certia had notice, but whether his vendor had. As we have seen from the synopsis of the special finding, his grantor paid value, took in good faith and without notice. The rule, that a purchaser without notice may sell to one with notice, is for the protection of the innocent purchaser; for, if it were otherwise, such a purchaser, although entirely guiltless of wrong, would have his property bound up in his own hands, and the right of alienation entirely destroyed.

A question of some difficulty remains. It is plausibly argued that Mrs. Langard had not paid all of the purchase-money when the execution was levied, and that she can not be deemed to have been a *bona fide* purchaser. *Rhodes v. Green*, 36 Ind. 7, is cited in support of appellants' argument. The difference between that case and the present is, that there the vendee had actual notice of the vendor's fraud, and that there was no second conveyance. There was in the present case no actual notice of fraud, nor was there even notice of appellants' claim. The question whether the levy of execution was notice to Mrs. Langard is, therefore, one of impor-

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tance. It is the rule in very many cases, that the owner is not bound to take notice of matters revealed by a record made subsequently to the acquisition of his rights or title. A vendee who executes a mortgage is not bound to ascertain that no executions have been levied subsequent to his purchase, although based upon a claim anterior to his purchase. A mortgagee who releases a mortgage is not bound to look to the record to ascertain whether the rights of purchasers have attached since the execution of his mortgage. It seems to us, that upon the same principle it must be held that a purchaser is not chargeable with constructive notice of the levy of an execution issued upon a judgment against a third person rendered subsequent to his purchase. Records are constructive notice of liens or rights existing at the time of the purchase, not of rights or liens acquired subsequently. Victorine Langard had, therefore, neither actual nor constructive notice of appellants' claim, and her rights were in no wise affected thereby. Her right to alienate was neither hampered nor restricted, and her assignee or vendee took what she had authority and right to assign and convey.

It is expressly found that Certia had no notice of any fraudulent design, that he did not know of appellants' claim, that he purchased in good faith, and that he has paid all of the notes executed to Victorine Langard, and that he has paid to Hedekin all the notes which matured before the trial of the present action. Certia is, therefore, not chargeable with actual notice of any defect in his vendor's title, and the only ground upon which any claim can be plausibly urged against it is that the levy of the execution was notice. Conceding, but not deciding, that this was notice, he occupies no worse situation than that of an ordinary purchaser with notice buying from a vendor without notice. It was apparent from the record that neither judgment nor execution was a lien against the property in the hands of Victorine Langard, and it is also apparent that she was entirely innocent of any fraudulent design, and there was therefore no reason why she could not

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convey a good title. Enquiry would have resulted in informing him that the lien of the execution was inoperative as against the land in the hands of his vendor, and he had a right to buy such a title as his vendor could convey.

When Victorine Langard sold to Peter Certia there was no purchase-money due Joseph Langard. The purchase by Victorine was from Hedekin, and all the purchase-money then unpaid was due to him. We can not in the face of this fact assume that Joseph Langard had any interest in the land. If there had been unpaid purchase-money due to the debtor, Joseph Langard, then a different question would have been presented. It is true that one thousand dollars paid by the debtor was credited upon the purchase by Victorine, but we are bound to assume that so far as Mrs. Langard was concerned this was done in the utmost good faith. There was but one reason why the husband could not consent to the rescission of the contract between him and his vendor, and give his wife the benefit of the money which he had paid and that reason is, that he had no right to make a gift while owing debts which he could not pay. There was no gift. The crediting of the one thousand dollars upon Victorine's purchase must be regarded as a part of the consideration which induced her to buy the land. It can not be inferred that she would have paid the amount due Hedekin, unless she was allowed the benefit of a former payment. It may well have been that she deemed the property worth no more than the unpaid purchase-money due her husband's vendor. To presume fraud would be to violate an elementary rule. To presume that Mrs. Langard had knowledge of her husband's fraudulent purpose, would be to violate the settled rule, that what is not stated in the special finding is to be deemed as not existing. To presume that Mrs. Langard was a mere volunteer, would be to infer a thing which the special finding affirmatively shows to be untrue.

Judgment affirmed.

 Stribling v. Brougher.

No. 6769.

STRIBLING v. BROUGHER.

79	328
130	331
79	328
132	130
79	328
140	496

PLEADING.—Complaint of Several Paragraphs.—Joint or Several Demurrer.—**Practice.**—Where “The defendant demurs to the first, second and third paragraphs of the complaint, each separately, for the reason that neither paragraph, separately considered, states facts sufficient to constitute a cause of action,” the demurrer is not joint, but is separate and several, and will test the sufficiency of the facts in each paragraph of complaint.**SAME.—Numbering Causes of Demurrer.—Waiver.—Supreme Court.**—Where only one ground of objection to a pleading is assigned in the demurrer thereto, it need not be numbered; but if two or more grounds of objection are specified in the demurrer, the statute provides that, unless the grounds be numbered, the demurrer “shall be overruled.” This statutory provision is for the benefit of, and may be waived by, the adverse party; and unless the record shows an objection in the circuit court to the demurrer, upon the ground that the several causes therefor were not numbered, the objection will be considered as waived, by the Supreme Court.**SAME.—Complaint to Quiet Title and Set Aside Deed.—Copy of Deed.**—In a complaint to quiet the title to real estate and to set aside a deed, the action is not founded upon the deed, and a copy of the deed is not a necessary part of the complaint.**SAME.—Prayer for Relief.—Demurrer.**—A demurrer to a complaint for the want of sufficient facts will not reach a defect, if any exist, in the prayer for relief.**HEARSAY EVIDENCE.—Vendor's Declaration after Conveyance.—Competency.**—The declarations of a vendor of real estate, made after his conveyance, are not admissible in evidence to affect the title of any one claiming under him.

From the Jennings Circuit Court.

E. P. Ferris and *W. W. Spencer*, for appellant.*T. C. Batchelor*, for appellee.

Howk, J.—In this action, the appellee sued the appellant in a complaint of three paragraphs. The object of the suit was to obtain a judgment and decree of the court, declaring a certain quitclaim deed, described in the complaint, to be null and void, and quieting the appellee's title to certain real estate, particularly described, in Jennings county, as against the appellant. The issues in the cause were tried by the

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court, and a finding was made for the appellee; and over the appellant's motion for a new trial, and his exception saved, the court rendered judgment for the appellee, in accordance with its finding.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court: ' 1.

1. In overruling his demurrer to the third paragraph of the complaint; and,

2. In overruling his motion for a new trial.

In the third paragraph of his complaint, the appellee alleged in substance, that on the 4th day of March, 1872, he purchased of Archibald S. Welton, who was then the owner in fee thereof, and, on said day, the said Welton and his wife conveyed to appellee by deed the following described real estate in Jennings county, Indiana, to wit: Beginning in the middle of the Muscatatuck river, thirteen poles south of the line dividing the southeast quarter of section 3 and the northeast quarter of section 10, all in town 6 north, of range 8 east, and running thence west and parallel with the government line 108 poles to a corner, 13 poles south of the southwest corner of the southeast quarter of said section 3, thence north with the west line of said southeast quarter 123 poles, thence north $48\frac{1}{2}^{\circ}$ east 18 poles and 12 links, thence north 48° east 12 poles, thence north 24° east 3 poles, thence south 4° east 8 poles, thence south 40° east 18 poles, thence south 2° west 14 poles, thence south 46° east 16 poles, to the Muscatatuck river, thence north 74° east 22 poles, thence north 86° east 20 poles, thence south 73° east 32 poles, thence south 37° east 20 poles, thence south 24° west 70 poles, to the place of beginning, except a small tract thereof conveyed by said Welton and wife to Ellen Read and others, which conveyance was recorded in deed book 8, p. 456, of the records of the recorder's office of said county, containing four acres, three roods and fifteen poles; that John S. Silver, then recorder of said county, acted as the scrivener of said Welton and the appellee in the drafting of said deed from said Wel-

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ton and wife to appellee, for the land so purchased by him; that said Silver was instructed by the parties to said deed at the time to draw it so as to include all of the land above described, except the said small tract previously conveyed to said Ellen Read and others, which said small tract was the extreme northwest corner of the above described land; that in drafting said deed, said Silver made a mistake in the west line of said land, in this: in counting the length thereof, after deducting from the said line the west line of the said small tract conveyed to said Ellen Read as aforesaid, the said Silver, forgetting that said west line began thirteen poles south of the southwest corner of said southeast quarter of said section 3, and laboring under the mistake that said line began at the southwest corner of said southeast quarter, made the said west line only ninety poles in length, and so wrote the same in said deed, instead of one hundred and three poles the true length thereof, after deducting the said small tract conveyed to said Ellen Read and others as aforesaid; that said scrivener also by mistake omitted in said deed the word "corner," after the place where the word "southwest" should have been written therein, in describing the southern commencement of said west line, and also, by mistake, wrote certain initials and used certain characters, for certain words, where the same, or any of them, occurred in said conveyance, all of which mistakes at the time were overlooked by said Welton and the appellee; that, by the mistake in the description of the length of said west line as aforesaid, the descriptions following in said deed were impossible of location and will not, if strictly followed, close or embrace any land whatever, and will not strike the middle of the branch nor the Muscatatuck river, as described in said deed to appellee; but that, if said west line is located as designed by said Welton and appellee, at the time of the execution of said deed to appellee by said Welton, and as said Silver was directed to locate it at the time by said Welton and appellee, in making the length thereof one hundred and three poles, all the remainder of

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the description contained in said deed would be intelligible, could be readily located and would close so as to embrace the identical land intended to be conveyed by said deed to appellee from said Welton; that all the said facts, that is to say, the purchase by appellee from said Welton of said land, the conveyance by said Welton to appellee, the mistake made in the description in said deed by the said scrivener, that the said Welton meant to convey to the appellee by said deed, and the appellee had purchased of said Welton, all of the said first described tract of land except the said small tract of land so conveyed to said Ellen Read and others, were well known to the appellant at the time he was guilty of and did the wrongful acts thereafter complained of and set forth.

The appellee averred, that the appellant, well knowing the premises, and that the appellee was the owner and in the possession of all of said first described tract of land, except the said small tract conveyed to said Ellen Read and others, unlawfully entered upon the same, without the appellee's knowledge or consent, and carried away therefrom, and appropriated to his own use, a large number of appellee's rails, of the value of \$10.00; that at the — term, 187—, of the circuit court of said county, the grand jury thereof found an indictment against the appellant for malicious trespass, in carrying from said land and appropriating appellee's said rails, upon which indictment the appellant was duly arraigned, tried and convicted, and fined — dollars, at the — term, 187—, of said court; that from said judgment the appellant took an appeal to this court, and employed an attorney, and, in preparing for the defence of said suit, it was discovered that the land described in said deed from said Welton and wife to the appellee did not embrace the particular land upon which said trespass was committed, and that, while the appellee had purchased from said Welton, and he and his wife had meant to convey to appellee, by their said deed executed on March 4th, 1872, the entire tract of land first described, yet, by reason of said mistake of said scrivener, there was a small

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portion of said tract which was not embraced within the metes and bounds given in said deed; that thereupon, on the — day of —, 1876, the appellant procured from said Welton and wife, then living in Missouri, for the sum of \$25.00, their quitclaim deed to him of the said small portion of the land, so sold and intended to be conveyed to the appellee, by the said deed of March 4th, 1872, which said small portion of said land was described by metes and bounds and alleged to contain two acres, more or less; that, with the design of cheating and defrauding the appellee out of said two acres of land and of setting up title thereto, the appellant procured his said deed to be recorded in the proper record of the recorder's office of said county, and entered upon the said two acres, and notified the appellee, that he, the appellant, was the owner of the land described in his quitclaim deed, and meant to hold the same, and then claimed to be the owner thereof and threatened to cut and remove the timber therefrom.

The appellee further alleged that the said quitclaim deed to appellant was a cloud upon appellee's title, which ought to be removed. Wherefore the appellee prayed that his title to the first described tract of land might be quieted, that the said deed executed by said Welton and his wife to the appellant might be declared null and void, and of no effect whatever, and that the appellant might be forever enjoined from setting up or claiming title to said land by virtue of said quitclaim deed, and for all other proper relief.

Before passing upon the sufficiency of this paragraph of complaint, it is proper that we should consider and dispose of some objections urged by the appellee's counsel to the form and substance of the appellant's demurrer to the complaint. Omitting the title of the cause and court, and the signature of counsel, this demurrer reads as follows:

"The defendant demurs to the first, second and third paragraphs of the complaint, each separately, for the reason that neither paragraph of the complaint, separately considered, states facts sufficient to constitute a cause of action."

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The appellee's counsel says: "We think this is a joint demurrer to the three paragraphs of the complaint, and should have been overruled as to all, if any one is good." In support of his position counsel has cited a number of cases in this court, in several of which demurrers, very similar in form to the demurrer in this case, were held to be insufficient; but these rulings do not meet with our approval, and we can not follow them. Counsel further says: "Again, the statute provides (2 R. S. 1876, p. 58, section 50) that 'unless the demurrer shall distinctly specify and number the grounds of objection to the complaint, it shall be overruled.' The demurrer under consideration does not *number* the grounds of objection, and therefore the court should have overruled it. The statute is imperative, and there can be no escape from this conclusion." The statute is certainly mandatory in form, but it must be held, we think, as merely directory. Surely, where only one "ground of objection" is assigned in the demurrer, as in this case, it could hardly be claimed that the one cause must be numbered, or that, in default thereof, the demurrer must be overruled. In any case, even where all the statutory causes have been assigned in the demurrer and have not been numbered, and even conceding that the statutory provision in question is mandatory, it seems to us this court must hold that the statutory requirement is one for the benefit of the adverse party, which it is competent for him to waive. Where, as in this case, the record fails to show that any objection was taken to the demurrer, in the circuit court, upon the ground that the several causes of demurrer were not numbered therein, it might well be said, we think, upon the theory that the statute is mandatory, that the objection had been waived and could not be made for the first time in this court.

The statutory provision above quoted is, certainly, no more imperative or mandatory in its terms than the provisions of section 74 of the code of 1852, which require that every material allegation in a complaint or answer, not specifically controverted by the adverse party, shall be taken as true. Yet,

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this court has uniformly held, for more than a quarter of a century, that if parties go to trial without answer or reply, and without any action had or asked for, in the court below, upon the party's failure to answer or reply, the filing of such answer or reply must be regarded as having been waived below, when the objection is made here for the first time, that no answer or reply had been filed. In such a case it will be considered by this court, notwithstanding the mandate of the statute, that the complaint or answer has been controverted, as if a denial had been filed. *Casad v. Holdridge*, 50 Ind. 529; *Purdue v. Stevenson*, 54 Ind. 161; *Bass v. Smith*, 61 Ind. 72.

In the case at bar, we are of the opinion that the appellee is in no condition to complain, in this court, of either the form or substance of the demurrer to his complaint, and, if he were, that neither of his objections to such demurrer is well taken.

We pass now to the consideration and decision of the questions presented and discussed by the appellant's counsel in their brief of this cause, and arising under the alleged error of the circuit court, in overruling the demurrer to the third paragraph of the appellee's complaint. The first point made by counsel is, that the third paragraph of complaint is bad on the demurrer thereto, for the want of sufficient facts, for the reason that the quitclaim deed, therein mentioned, from Archibald S. Welton and his wife to the appellant, was not set out in, nor filed with, nor in any manner made a part of, said paragraph of complaint. Counsel say: "So far as this paragraph seeks to set aside the appellant's deed, it is founded upon it; and a copy of the appellant's deed should have been filed with the complaint, which has not been done. A copy of a deed to appellee is filed with the complaint, but that will not cure the defect."

In support of their position, that a copy of the quitclaim deed from Welton and his wife to the appellant was a necessary part of the third paragraph of the complaint, the appellant's counsel have cited the first clause of section 78 of the civil code of 1852, providing that "When any pleading is

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founded on a written instrument, or on account, the original, or a copy thereof, must be filed with the pleading." Counsel have also cited many cases from the reports of the decisions of this court, and, doubtless, many more might have been cited, in which this statutory rule of pleading has been clearly recognized and acted upon as the controlling rule, whenever the written instrument, within the meaning of that expression, has been the foundation of the action. No case has been cited by counsel, however, and we know of none, in this court, wherein it has been held, in such a suit as the one now before us for quieting the plaintiff's title to real estate, that a deed under which the defendant might claim an adverse title was the foundation of the plaintiff's cause of action, or that a copy of such deed was a necessary part of the plaintiff's complaint. The principal relief, for which the appellee sued in the third paragraph of his complaint, was to obtain a judgment and decree of the court quieting his title to the real estate in controversy, against an unfounded claim, as alleged, of the appellant thereto. It was not necessary that the appellee should state in his complaint the particulars of the appellant's adverse claim to the real estate, or set out the deed under which he asserted such claim.

In *Marot v. The Germania, etc., Association, etc.*, 54 Ind. 37, in delivering the opinion of the court, BIDDLE, J., said: "The cloud that overhangs, or the cause which disturbs, a title to lands, must necessarily be much better known to him who claims under it adversely, than to those who claim by a different title, and in such actions, it is peculiarly a matter of defence; it is, therefore, unnecessary for the plaintiff to particularly state such cloud or disturbing cause, if it is shown to be adverse to his claim." *Dumont v. Dufore*, 27 Ind. 263; *Gillett v. Carshaw*, 50 Ind. 381.

As a means to the end of quieting his title, the appellee asked that the quitclaim deed from Welton and his wife to the appellant might be set aside and declared null and void, and of no effect. In the third paragraph of the complaint this

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deed was described by its date, by the names of the grantors and grantee therein, by the description of the real estate quit-claimed thereby, by the consideration expressed therein, and by the book and page of the records of the recorder's office of said Jennings county, where said deed was recorded. This description of the deed answered every conceivable purpose in the case which a copy of the deed would or could have accomplished; and, therefore, we think that the appellant's objection to the third paragraph of the complaint, on the ground that a copy of said deed was not filed therewith, is not well taken in any view of the question.

The appellant's counsel next complain of the third paragraph of complaint, apparently upon the ground that the appellee did not, in his prayer for relief, ask a reformation of his own deed from Welton and his wife. This, however, is no ground for a demurrer to the complaint; and we can not see that the question is before us. It may be presumed that the appellee asked for such relief as he wanted and supposed he was entitled to. In *Bennett v. Preston*, 17 Ind. 291, it was held by this court that a demurrer to a complaint for the want of facts must be overruled, if, on the facts stated, the plaintiff was entitled to any relief whatever, although not to the relief demanded. Such a demurrer will not reach a defect, if any exists, in the prayer for relief. *Goodall v. Mopley*, 45 Ind. 355; *Baker v. Armstrong*, 57 Ind. 189.

Some other objections have been pointed out by the appellant's counsel to the third paragraph of the complaint, but as the facts stated therein were certainly sufficient to constitute a cause of action in appellee's favor, for quieting his title to the real estate in controversy, we are of the opinion that these objections were not reached by the demurrer to the paragraph, and, therefore, we do not discuss them. In such a case, objections to particular parts of a complaint can only be reached by motions to strike out, or by objecting to evidence in support thereof. Our conclusion is, that the court did not err in overruling the demurrer to the third paragraph of the complaint.

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In discussing the questions arising under the alleged error of the trial court in overruling the motion for a new trial, the point is made by the appellant's counsel that the court erred in the admission of incompetent evidence. This evidence consisted of alleged declarations of the said Archibald S. Welton concerning the real estate in controversy, made after he had sold and conveyed such real estate to the appellee and in the absence of the appellant. These declarations were objected to at the time they were offered, on the ground that they were hearsay and immaterial; but the court overruled the appellant's objections and admitted the declarations in evidence, and to these rulings he excepted and subsequently assigned them as causes for a new trial, in his motion therefor. We are of the opinion that the court erred in the admission of these declarations of the said Welton in evidence, on the ground that they were mere hearsay and therefore incompetent. In *Steeple v. Downing*, 60 Ind. 478, on page 503, it is said: "The declarations of a party in possession of land are competent evidence against those claiming the land under him, to show the character of his possession and the title by which he held it, but not to sustain or destroy the record title." In the case at bar, the declarations of Welton, admitted in evidence, were made after he had sold and conveyed away the land; but they seem to have been offered and admitted for the double purpose of sustaining the record title of the appellee and destroying that of the appellant, both of whom claimed title under said Welton.

In *Thompson v. Thompson*, 9 Ind. 323, it was said: "The general rule is well settled that the declarations of a vendor, made after his conveyance, are not admissible in evidence to defeat it. *Doe v. Moore*, 4 Blackf. 445, and authorities there cited. It is true that the declarations of a party in possession, in derogation of his own title, may be given in evidence." In *Kieth v. Kerr*, 17 Ind. 284, it was held, that declarations made by a person under whom a party claims,

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after the declarant had parted with his right, were utterly inadmissible to affect any one claiming under him. The same doctrine was also declared in *Wynne v. Glidewell*, 17 Ind. 446.

The counsel on both sides of the case now before us have elaborately discussed the question of the sufficiency of the evidence to sustain the finding of the trial court; but, as the judgment must be reversed and a new trial had for the error of the court in the admission of incompetent evidence, we must decline to consider the question of the sufficiency of the evidence. For the reasons given, the court erred in overruling the motion for a new trial.

The appellee has assigned, as a cross error, the decision of the circuit court in sustaining the demurrer to the second paragraph of his complaint, and in his brief his counsel "confidently asks, if the case is reversed, that it be reversed on the cross error assigned by appellee."

The appellant, however, has moved this court in writing, to strike out such cross error, because the appellee did not file his brief thereon, within sixty days after the submission of the cause, in compliance with Rule 14 of the written rules adopted by this court on the 6th day of March, 1871. Appellee's assignment of cross errors is entitled as of the May term, 1878, of this court, at which term the cause was submitted on call, upon his default. We are bound to presume, that the assignment of cross error was made on or before the submission of the cause; because it could not have been made afterwards without the leave of this court, and no such leave was asked for or granted in this case. Appellee's brief of this cause was not filed until June 6th, 1881, or more than three years after the submission of the cause and the assignment of the cross error.

The appellant's motion is therefore well taken, and must be sustained; and appellee's cross error is struck out accordingly.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Antrim *et al.* v. Gilson *et al.*

No. 8585.

ANTRIM ET AL. v. GILSON ET AL.

REFLEVIN.—*Chattel Mortgage.—Parties.—Assignment for Benefit of Creditors.—*

In replevin by a mortgagee of chattels against a trustee under an assignment by the mortgagor for the benefit of creditors, a creditor as such is not a proper defendant, and it is error to admit him as a defendant.

From the Grant Circuit Court.

J. L. Custer, for appellants.

A. Steele and *R. T. St. John*, for appellees.

NIBLACK, J.—As it was commenced, this was an action by Jacob Antrim and John W. Kindig against Oren E. Ransom and Jasper A. Gauntt, and was for the recovery of the possession of a stock of dry goods, notions, clothing, hosiery and other articles of merchandise, including fixtures said to be kept and detained in a certain building.

The complaint was in three paragraphs, and each paragraph alleged the facts upon which the plaintiffs' claim to the property was based, as well as the nature of the claim under which the defendants were in possession. The action was prosecuted upon the theory that the plaintiffs were entitled to the possession of the property under a chattel mortgage executed to them by Ransom to secure the payment of certain promissory notes upon which default had been made, and that the defendants were in possession, in right of the said Gauntt, under an alleged assignment afterwards made by Ransom to Gauntt for the benefit of his, the said Ransom's, creditors, which assignment, it was charged, was illegal, inoperative and void as against the plaintiffs.

The defendants demurred to the complaint, but their demurrer was overruled.

Elon W. Gilson thereupon moved to be admitted a party defendant to the action, and in support of his motion filed his petition duly verified by affidavit, representing that Rebecca

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A. Ransom was a creditor of the said Oren E. Ransom in the sum of \$4,707.32, evidenced by certain promissory notes; that the said Rebecca A. Ransom was then dead; that he, the said Gilson had been appointed administrator of her estate; that since his appointment as such administrator he had recovered judgment in one of the courts of competent jurisdiction in the State of Ohio against the said Oren E. Ransom for the amount due from him to the said Rebecca, that is to say, said sum of \$4,707.32; that consequently, as administrator of the said Rebecca's estate, he had an interest in the questions involved in this action. Wherefore he prayed that he might be admitted as a defendant in the action and permitted to defend his said interest therein.

Whereupon the said Gilson was, over the objection and exception of the plaintiffs, admitted as a defendant in the action, and permitted to file a separate demurrer to the complaint, which demurrer was afterwards sustained by the court.

Issue being joined between the plaintiffs and the other defendants, the court trying the cause made a finding for the plaintiffs. Final judgment was then rendered against Ransom and Gauntt for a recovery of the property sued for, and in favor of Gilson upon his demurrer to the complaint.

The plaintiffs have appealed, and the first error assigned is upon the decision of the court admitting Gilson as a defendant.

This action constituted what was, in many respects, quite an anomalous proceeding in the court below. While the primary object evidently was to recover the possession of the personal property described in the complaint, there was, blended with it, a manifest purpose of having the assignment from Ransom to Gauntt at the same time set aside as fraudulent and void as against the plaintiffs.

In its essential characteristics, however, we think the action ought to be regarded as having had for its object only the recovery of the possession of the personal property, treating all the averments as to the supposed illegal and invalid qualities of the assignment as surplusage merely.

Section 22 of the code of 1852, 2 R. S. 1876, p. 43, which was in force when the proceedings below were had in this cause, provided that when a complete determination of a controversy could not be had without the presence of other parties, the court was required to have such other parties joined in the action, "And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be made a party, by the proper amendment."

To entitle a person to be made a party to an action like this, upon his own application, under that section, it must be made to appear in some appropriate way, that he has an interest in the subject-matter in controversy, which may, or is likely to, be affected by the ultimate decision of the cause.

The petition of Gilson, the substance of which is given as above, did not, in our opinion, show such an interest in the matters in dispute, between the original parties, as entitled him to admission as a party defendant in this action. It did not assert any lien upon or right of possession in the property in litigation on the part of Gilson. It represented Gilson only to be, in his fiduciary capacity, a general creditor of Ransom, one of the original defendants, without any specific claim of any kind upon the property.

If the action had been solely for the purpose of setting aside the assignment from Ransom to Gauntt, Gilson would not have been a necessary, nor ordinarily a proper, party defendant. Gauntt, as the assignee, would have sufficiently represented the general creditors. *Burrill Assignments*, 3 ed., p. 676, section 504.

The court erred in admitting Gilson as a defendant in the action.

Although the names of Ransom and Gauntt are used as appellees in this appeal, no objection is made as to the judgment against them, and consequently no order will be made here concerning that judgment.

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The judgment in favor of Gilson upon his demurrer is reversed, with costs, and the cause remanded, with instructions to overrule his application to be made a defendant in this cause.

No. 8687.

CLARK ET AL. v. RHOADS ET AL.

LANDLORD AND TENANT.—*Notice to Quit.*—*Lease.*—*Rent.*—A parol lease to run until the landlord shall sell the premises at a certain price, the rent to be paid every two months, is good, and on the happening of the contingency the lease terminates, no notice to quit being necessary.

EVIDENCE.—*Admissions.*—A witness, on cross examination, denied having made a certain statement inconsistent with her testimony in chief, whereupon a witness of the adverse party was permitted to testify that she so stated.

Held, that it was not error to refuse to permit the adverse party to have his witness repeat this statement, *as an admission.*

From the Montgomery Circuit Court.

R. B. F. Peirce and *L. J. Coppage*, for appellants.

J. F. Harney, for appellees.

MORRIS, C.—The appellees, William M. Rhoads and Daniel Stamp, brought this suit to recover from the appellants, Charles Clark and Thomas Carroll, the possession of a part of lot No. 7, in block No. 4, in the old plat of the town of Ladoga, Montgomery county, Indiana. The first paragraph of the complaint is in the usual form. The second describes the premises by metes and bounds; avers that the appellants verbally leased the same on the 13th day of January, 1879, from Phebe Clements, then the owner of said lot, until she should sell the same for \$1,700; that on the 29th day of August, 1879, the said Phebe Clements sold and conveyed said lot to the appellees for \$1,700, of which sale the appellants had due notice; that the appellants unlawfully hold possession of said

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lot, though requested by the appellees, before the commencement of this suit, to give and yield to them the possession of the same. The appellants answered the complaint by a general denial. The cause was tried by a jury, who returned a verdict for the appellees.

The appellants moved the court for a new trial, for the following, among other reasons:

That the verdict was not sustained by sufficient evidence, and because the court erred in refusing to admit certain testimony offered by the appellants.

The error assigned is the overruling of the appellants' motion for a new trial.

The testimony is quite conflicting. There is evidence legally tending to prove that Phebe Clements leased to the appellants the premises in controversy from the 13th day of January, 1879, until she could sell the same for \$1,700, upon the happening of which event the tenancy was to terminate; that the rent was to be \$12.50 per month, and payable every two months; that on the 29th day of August, 1879, the said Clements sold and conveyed said premises to the appellees for the sum of \$1,700, of which sale the appellants had notice; that possession of the premises had been demanded by the appellees and refused by the appellants before suit was commenced. There was no testimony tending to show that a month's notice to quit had been given to the appellants, or that a month's notice to quit on the 13th of any month had been given to them. The testimony of the appellants tended strongly to show that they had leased the premises from Mrs. Clements for two years from the 13th day of January, 1879.

This court will not weigh the conflicting testimony and determine where the preponderance lies. If, upon the facts which the testimony tends to establish, the law will sustain the verdict, this court, as it has often held, will not disturb it.

The real question is, Did the sale and conveyance of the premises by Mrs. Clements to the appellees, on the 29th day of August, 1879, terminate the tenancy of the appellants? In

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answering this question we must assume, as there was evidence given in the case legally tending to establish the facts, that the premises were verbally leased by Mrs. Clements to the appellants until she could effect a sale of the same for \$1,700, at which time they were to give up the possession; that on the 29th day of August, 1879, she did sell and convey the lot to the appellees for \$1,700, of which the appellants had notice. To these facts Mrs. Clements testifies, and some of them were testified to by other witnesses.

It was quite competent for Mrs. Clements and the appellants to make the verbal lease as above stated, and to limit the duration of the term upon the contingency of the sale of the leased premises. There is nothing illegal or wrong in such a contract, and we know of no reason why it should not, in its obvious spirit and meaning, be obligatory upon the parties, and its performance enforced.

The agreement to give up the possession upon a sale of the premises, or to hold until a sale should be made, operated as a contingent limitation of the term, and when the contingency happened, the term was at an end—the whole interest and the right of possession thereupon vested in the appellees.

"A limitation," says Taylor, in his work on Landlord and Tenant, section 273, "marks the period which is to determine the estate, without entry or claim, and no act is necessary to vest the right in him who has the next expectant interest." *Den v. Hance*, 6 Halst. 244; *Miller v. Levi*, 44 N. Y. 489.

Upon the sale and conveyance of the premises in controversy, by Mrs. Clements to the appellees, the rights of the appellants under the verbal lease, its terms being as stated by Mrs. Clements, terminated, and the interest vested in the appellees without any act or claim on their part.

If the appellants were, as they contend, entitled to one or two months' notice to quit, the lease and its manifest purpose would be defeated. The obvious purpose of the lessor was to so lease the lot that, when she should find a purchaser, she

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could put him in possession. The fact that the rent was to be paid every two months did not fix the duration of the term. The rent may be payable during or at the expiration of the term, or in advance, or after its termination. The time of its payment does not fix the term of holding. *Ela v. Bankes*, 37 Wis. 89; *Hollis v. Pool*, 3 Met. 350.

On cross examination, Mrs. Clements, the principal witness on the part of the appellees, was asked: "Did you not tell Dr. M. C. Drake, in Ladoga, a short time after you rented the premises to defendants, that you had rented to them for two years?" She denied that she had so stated. She was also asked if she had not, on the 20th of January, 1879, in the alley near the premises, made the same statement to one J. M. Donaldson, which she also denied.

Dr. Drake was then called as a witness, and asked by the appellants: "Did Mrs. Clements tell you in Ladoga, a short time after she had rented the premises to defendants, that she had rented to them for two years?" To this question, the Dr. answered "yes." The appellants then, as the bill of exceptions states, offered to prove by this same witness, as an admission made by Mrs. Clements in the same conversation, that she had "told him soon after she had rented the property in question to the defendants and before she had conveyed it to the plaintiffs, that she had rented it to defendants for the period of two years." To this appellees objected and the court sustained the objection. It is insisted that in this the court erred.

It is quite clear, that, after having proven by Drake the statement claimed to have been made to him by Mrs. Clements, the appellants thought it necessary, in order to entitle the statement to be considered as an admission made by Mrs. Clements while the owner of the lot, to re-prove by the same witness the same statement. This was not necessary. The statement of Mrs. Clements had been proven without objection. Whether proof of the statement had been made for

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the purpose of impeaching Mrs. Clements as a witness, or that it might be considered as an admission, or both for the purpose of impeachment and as an admission, does not appear. It was hardly necessary to repeat the proof, in order that the statement might be considered as an admission of Mrs. Clements in relation to the time for which she had leased the lot and also as an impeaching statement. It was enough to prove the statement once. Its repetition by the same witness could give it no additional force. Upon what ground the appellees objected to the question is not stated in the bill of exceptions, nor does it appear from the record, upon what ground or for what reason the court sustained the objection. As the presumption is in favor of the action of the court below, its ruling will be sustained, if it can be upon any ground consistent with the record. Had the court sustained the objection on the ground that a repetition of the proof was not necessary, in order to entitle the statement to be considered for the purpose of impeachment and as an admission, the ruling would have been unobjectionable. We must presume that, for this reason and for this purpose, the objection was sustained. If so, there was no error in the ruling. Had the appellants asked the court to instruct the jury upon the point, a different question would be presented.

The same may be said as to the testimony of the witness Donaldson. He had once testified to the statement which he was not allowed to re-testify to. There was no error in this.

We have considered all the questions discussed by the appellants. The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

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No. 8589.

79	347
169	576

BENNETT ET UX. v. GADDIS, ADM'R.

DECEDENTS' ESTATES.—Administrator.—Sale of Lands.—In a petition to sell lands, an averment that the petitioner is administrator of the deceased is a sufficient statement of his representative capacity. Profert of his letters or an averment of his appointment and qualification is needless.

SAME.—Will.—Where the deceased devised his real estate, charging it with the payment of his debts, his personal representative may, if the personal estate be insufficient, obtain an order to sell the lands, the devise being no obstacle whatever.

SAME.—Petition.—The petition in such a case is not bad as against the devisee for a failure to aver that the will has been admitted to probate, inasmuch as, without the will, he would have no interest in the land.

SAME.—Evidence.—Commissioner's Deed.—Possession of the testator, with a deed to him purporting to be from a commissioner appointed by a competent court, without the record on which the deed is based, is, as against the devisee, sufficient evidence of the testator's title.

SAME.—Judgment.—A judgment in a suit between the devisee and a stranger, whereby the title was adjudged to be in the former, is not, on the hearing of such a petition, binding upon the administrator, as evidence.

SAME.—Will.—Conveyance.—A will is not revoked by an invalid conveyance subsequently made by the testator.

From the Clinton Circuit Court.

J. N. Sims, for appellants.

J. Claybaugh and *B. K. Higinbotham*, for appellee.

ELLIOTT, C. J.—The appellee petitioned for an order to sell real estate belonging to the estate of William Webb, deceased, of which he is the administrator. The court made the order prayed for, and from the judgment entered in the proceedings this appeal is prosecuted.

The complaint alleges that the appellee is the administrator with the will annexed of William Webb, deceased, and this is a sufficient statement of his representative character. He was not bound to set out or make profert of his letters of administration. It is sufficient in such cases as the present for the petition to show that the petitioner is the administra-

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tor without setting out his appointment and qualification. *Kelley v. Love*, 35 Ind. 106.

The complaint sets forth a copy of the will of the decedent, which, omitting the formal parts and signature, is as follows:

"I give and bequeath to John Bennett and his heirs all my personal property and real estate situated in Ross township, Clinton county, except \$100 to be paid to Sarah J. Rikes. The condition of this will is that the said John Bennett is to keep and provide for William Webb during his natural life. That said William Webb shall keep one horse on the place; also, that the said John Bennett shall furnish plain tombstones for Mary Webb, also William Webb at his death; also, that the said John Bennett shall pay my debts at my death. Now, if the said John Bennett does not provide and support and kindly care for and treat the said William Webb, this will and testament shall be null and void."

It is alleged in the complaint that the appellant was placed in possession of the real estate under the provisions of the will; that the testator became a member of his family; that the will was delivered to a third person; that the testator died in March, 1876; that he died in debt to various persons; that these debts have not been paid, although two years have elapsed since the testator's death, and that claims to the amount of more than \$500 have been filed against his estate. It is also shown that the personal estate of the decedent did not exceed \$51.

Counsel on both sides have argued the question whether the condition stated in the will is a precedent or subsequent one; but it seems to us that it is not material whether it be regarded as the one or the other. The intent of the testator to charge the land with the payment of his debts is clear, and this burden fastened upon it by the will can not be displaced by the devisee. If he takes the benefit, he takes also the burden. The creditors have a right to the benefit of the provision made for them by their debtor. Where land is devised with a charge in favor of creditors, the devisee takes it subject to

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this charge. If such a devise makes it a condition of the devisee's right to the lands, that he shall pay the demands of the creditors of the testator, he can not hold the lands as against the creditors, without paying their demands. The creditors have a right to sell the land for the payment of their claims unless the devisee frees it from the charge in their favor, imposed by the testator's will.

The right to subject the lands to sale for the payment of debts is properly asserted through the medium of an administrator. Where the personal property is not sufficient to pay the debts of the testator, it is proper for the executor or administrator to petition for the sale of the real estate, of which the decedent died seized. The proceeding is properly conducted under the orders and supervision of the court having probate jurisdiction. The proceeds are to be distributed among the creditors as in cases where there is no attempt to devise the land.

The debts referred to are those owing at the time of the testator's death. A will speaks from the death of the person by whom it was executed. It operates upon things in the state and condition in which they are at the time of death. Some rare exceptions have been pointed out to this general rule, but this case is not within any of them. On the contrary it falls fully within the rule.

The objection that the complaint is insufficient because it does not allege that the will has been probated can not prevail. If the copy of the will were expunged from the complaint, there would be sufficient to show a right in the appellee to maintain his petition. Where a complaint shows a right to some relief it must be upheld, although it may contain many redundant allegations, and may not entitle the plaintiff to all the relief claimed. *Teal v. Spangler*, 72 Ind. 380; *Bayless v. Glenn*, 72 Ind. 5. If there was no will, or if the will was not effective because not probated, the appellant is so much the worse off, for all the right he has to contest the claim of creditors is conferred by the will. Without the

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will, or any reference to it, the petition shows a right to the relief prayed.

Upon the trial a deed executed to the decedent by a commissioner, appointed by the court of common pleas of Tippecanoe county, was read in evidence. Appellant is correct in saying that detached parts of a record are not admissible in evidence, but that the entire record should be introduced. *Foot v. Glover*, 4 Blackf. 313. This rule, however, extends only to such matters as are properly and strictly a part of the record, not as to matters which are merely collateral, although connected with the proceedings. Under the circumstances of this case the deed to the testator was properly admitted without the production of the record of the cause in which the judgment upon which it is founded was rendered. As both appellant and appellee claimed title from the same grantor, the latter was not bound to do more than show *prima facie* title in the common source. *Wilson v. Peelle*, 78 Ind. 384. The appellee proved possession in the testator, and also in the appellant under and through the testator, and the commissioner's deed was competent to show the character under which possession was held. The case before us is altogether unlike one where parties are claiming by titles derived from different sources.

A judgment was rendered in an action instituted against the appellant by one Ewing, adjudging the former to be the owner in fee of the land in controversy, and directing a conveyance to be made to him by a commissioner, and it is asserted that this judgment settles the title and right of the appellant. So far as the parties to that action were concerned, that judgment did settle the title, but not as against the appellee. Judgments bind parties and privies, but not strangers. The creditors of the decedent were not parties to that action, nor was the administrator.

The decedent in his lifetime executed a deed to Ewing, the plaintiff in the action referred to, and appellant maintains that the execution of this deed revoked the will. We can not

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assent to this proposition. The judgment introduced in evidence shows that this deed was not valid, and certainly an invalid deed can not revoke a will. But if the appellant's position upon this point were conceded, we can not perceive what benefit he could obtain. If the will was revoked, then the lands would be subject to sale for the payment of the debts of the decedent, unless some one had acquired title by valid grant. We need not spend time upon this branch of the case, for the evidence plainly shows that the existence of the will alone enabled appellant to defeat Ewing, and that all the right or interest which he has is derived from the will of William Webb.

We are not called upon to enquire what right, if any, the appellant has to demand compensation for taking care of the testator. There is no such question in this case.

Judgment affirmed.

Petition for a rehearing overruled.

No. 8567.

SEWARD v. THE CITY OF RISING SUN ET AL.

CORPORATIONS.—*Shares of Stock.*—*Personal Property.*—Shares of stock in incorporated companies, whether the property of such companies be tangible or intangible, are personal property.

SAME.—*Foreign Corporation.*—*Taxation of Stock.*—*City.*—*Railroad.*—A city has the right to tax its citizens for stock owned by them in a foreign railroad company, although a tax has been paid thereon in the State where the corporation is located.

From the Ohio Circuit Court.

A. C. Downey, for appellant.

J. B. Coles, for appellees.

BICKNELL, C. C.—This was a suit to enjoin the collection

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of taxes assessed by the City of Rising Sun against the appellant, one of its citizens, upon 400 shares of the capital stock of the Little Miami Railroad Company.

The complaint averred that the capital stock of said railroad company consisted of its railroad and the appurtenances thereof, all of which were in the State of Ohio, and were taxed there by the State of Ohio in the name of the company.

The appellee demurred to the complaint. The demurrer was sustained, judgment was rendered thereon against the appellant, and the temporary restraining order was dissolved.

The errors assigned are sustaining said demurrer and dissolving the restraining order. The question is, has a city a right to tax its citizens for stock owned by them in a foreign railroad company?

It was decided in *Riley v. Western, etc., Co.*, 47 Ind. 511, that under the act of Dec. 21st, 1872, 1 R. S. 1876, p. 72, there can be no assessment of the capital stock of a foreign corporation as against the corporation itself; but the question, whether shares of such stock are taxable when owned by individual citizens of this State, was not considered in that case.

All personal property, owned by persons residing in this State, whether it is in or out of the State, is subject to taxation, 1 R. S. 1876, p. 73, sec. 3, except certain property specified in section 7 of the act last cited. The property in controversy is not among the exceptions.

Shares of stock in incorporated companies, whether the property of such companies be tangible or intangible, are personal property. Cooley on Taxation, 16. That is the American doctrine. 2 Kent Com. 340, note.

In Indiana "all bonds or stocks, whether of bodies politic or corporate," are personal property. 1 R. S. 1876, p. 73, section 5.

A shareholder owns, as personal property, his proportion of the property of the company, and the certificates of shares are convenient means of indicating that proportion. "The legislative power governs the question of the amount, and the man-

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ner in which the citizens shall contribute to the public demands, subject only to fundamental laws." *DePauw v. The City of New Albany*, 22 Ind. 204; *Railroad Co. v. Pennsylvania*, 15 Wal. 300.

Cities have power to levy and cause to be collected, in each year, an ad valorem tax of not more than one per centum, for general purposes, on all property subject to State and county taxation, within such city. 1 R. S. 1876, p. 297, section 58; *Hilgenberg v. Wilson*, 55 Ind. 210; *The Toledo, etc., R. R. Co. v. The City of Lafayette*, 22 Ind. 262.

In the absence of any allegation to the contrary, the city of Rising Sun is presumed to be organized under the general law of the State in relation to cities. *Hilgenberg v. Wilson, supra.* And there being no averment in the complaint, that the value of the property in controversy was not legally ascertained and assessed by the assessor, nor that the board of equalization did not properly equalize the value of all the property liable to taxation within the city, it must be presumed that the assessor and the board did their duty. *Cooley on Taxation*, 290, 291.

The taxation of the stock in controversy to the owner thereof is in accordance with the general provisions of the law of Indiana. There is no provision in our statutes, which relieves the owner of stock in foreign corporations from the duty of listing such property, as there is in regard to stock owned in domestic corporations. 1 R. S. 1876, p. 76, section 15, clause 2.

The laws of the State of Ohio are not material. Where property is taxable by the laws of this State, it is immaterial how much it is taxed elsewhere.

In the absence of any statute to the contrary, although a corporation may be taxable for its corporate property, the owners of shares of its stock may be taxed therefor where they reside. *Conwell v. The Town of Connersville*, 15 Ind. 150.

The owner of shares of stock in a foreign corporation is

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liable to taxation thereon in the State where he resides, although a tax has been paid thereon in the State where the corporation is located. *Dyer v. Osborne*, 11 R. I. 321; *McKeen v. County of Northampton*, 49 Pa. St. 519.

There was no error in sustaining the demurrer to the complaint, nor in dissolving the restraining order. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things affirmed, at the costs of the appellant.

No. 8752.

WOOD v. ECKHOUSE ET AL.

REAL ESTATE.—*Action to Recover.—Practice.*—In an action for the recovery of possession of real property, no error is committed in striking out a special paragraph of answer when there is on file an answer of general denial; for under that all defences to the action may be given.

SAME.—*Costs.—Judgment.*—In such action, it is not error to render a judgment for costs collectible without relief from appraisal laws.

From the Madison Circuit Court.

W. R. Pierse, C. B. Gerard and D. W. Wood, for appellant.
H. D. Thompson and E. P. Schlater, for appellees.

FRANKLIN, C.—This is an action by appellees against appellant for the possession of a house and town lot in the town of Elwood, in said county. Issue was formed by a general denial. Trial by the court; finding for appellees; over a motion for a new trial, judgment was rendered for appellees.

The errors assigned in this court are:

- 1st. Overruling the motion for a new trial.
- 2d. Striking out first paragraph of answer.
- 3d. In rendering judgment for appellees for costs, collectible without relief from valuation laws.

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The reasons assigned in the motion for a new trial are, that the finding was contrary to and not sustained by the evidence, and was contrary to law.

The defence was a parol tenancy. The parties agreed that there had been a renting of the house and lot by appellees to appellant for one year, commencing March 1st, 1878; appellant insists that the contract of leasing gave him the option to hold the premises two years longer, and appellees admit that it gave him the privilege of holding one year longer. Appellant held the property one year longer, and refused to surrender possession at the end of the second year. This suit was commenced on the 5th day of March, 1880.

We have examined the evidence, and think it not only tends to support the finding, but that it preponderates in favor of appellees' construction of the contract. The finding is therefore sustained by the evidence, is not contrary to it, and is not contrary to law. There was no error in overruling the motion for a new trial.

The second error assigned is the striking out the first paragraph of the answer.

This paragraph of the answer set forth that appellant held the premises under a parol lease, and that the time thereof had not yet expired, and that he had received no notice to quit possession.

There was no error in striking out this paragraph, for the reason that under the statute, in this class of cases, all defences can be given in evidence under the general denial. 2 R. S. 1876, p. 252, section 596.

Under the third error assigned, it is insisted that the court erred in rendering judgment for appellees for costs, collectible without relief from valuation or appraisement laws.

There was no motion made in the court below to modify or change the judgment, nor any objections whatever made to the form or substance of its rendition, and without the attention of the court below being called to the objection, and an opportunity being given to remedy defects, it is too late to raise

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this objection for the first time in this court. But, if it were otherwise, this judgment was rendered April 2d, 1880, and, under the fee and salary bill of 1879, which was then in force, "All costs shall be collectible without any relief from valuation or appraisement laws of the State of Indiana." See Acts of 1879, p. 140, section 26.

There was no judgment for damages, and there is no error in the judgment for costs. We find no error in this record. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

No. 8808.

RYAN v. BEGEIN.

INSTRUCTION.—Issue.—Evidence.—An instruction, which is applicable to the issues and the case made by the evidence, is unobjectionable.

SAME.—Payment.—Harmless Error.—The omission of the court, in reciting the issues to the jury, to call their attention to a plea of payment, does not injure the defendant when there is no dispute about the amount paid.

SAME.—Counter-Claim.—Married Woman.—An instruction not to allow the defendant, upon his counter-claim, anything overpaid by him, if the jury shall find that the plaintiff was, at the time, a married woman, if erroneous, was harmless, where the jury did not find that anything was overpaid.

SUPREME COURT.—Weight of Evidence.—The Supreme Court will not disturb a judgment upon the weight of the evidence.

From the Madison Circuit Court.

W. R. Pierse and C. B. Gerard, for appellant.

W. A. Kittenger, J. W. Sansberry, M. A. Chipman and A. T. Harrison, for appellee.

BEST, C.—The appellee brought this action against the appellant, to recover the unpaid purchase-money of certain real

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estate and to enforce a vendor's lien. In the complaint it was, in substance, averred that the appellee sold and conveyed to the appellant, on the 16th day of January, 1875, the real estate in the complaint described, in consideration of which he agreed and promised to pay her five hundred dollars in addition to all liens and taxes thereon; that at the time the deed was executed he paid \$100, and the residue with the interest thereon from the 16th day of January, 1875, was due and remained wholly unpaid.

The appellant answered:

1. General denial.

2. Payment.

3. That he purchased and agreed to pay for the land mentioned in the complaint, \$3,540; that this sum was to be paid by assuming the payment of a mortgage and all other liens upon said land, and the difference, if any, was to be paid to appellee; that at the time of the purchase the amount of the liens was unknown to them, but believed to be much less than the contract price, and that he then paid to the appellee \$100; that afterward it was ascertained that the liens amounted to \$3,520, which he paid, and that the payments thus made by him exceeded the contract price.

4. A counter-claim, by which the appellant sought to recover back the \$80 overpaid by him as averred in the third paragraph of his answer.

A reply in denial of the second and third paragraphs of the answer and an answer of coverture to the counter-claim were filed by the appellee. The issues were submitted to a jury and a verdict returned for the appellee for \$524. Over a motion for a new trial, judgment was rendered upon the verdict. From this judgment the appellant appeals, and assigns as error the order of the court in overruling the motion for a new trial.

This motion was made because, as was alleged, the verdict was not supported by sufficient evidence, and the court erred in giving instructions numbered one, two and five, to the jury.

By instruction numbered one, the court charged the jury

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that if the plaintiff has proved by a fair preponderance of the evidence, that the defendant purchased of the plaintiff the real estate mentioned in the complaint, promising to pay all liens upon the land, and to pay the plaintiff \$500 over and above all liens upon the delivery of a deed, that plaintiff did deliver the deed, and that any portion of the five hundred dollars is due and remains unpaid, they should find for the plaintiff for such sum as remained unpaid, with interest thereon from the time it became due.

This instruction was unobjectionable. It was applicable to the issues and to the case as made by the evidence of the appellee. No error was committed in giving it.

By the second instruction the court said to the jury, in substance, that the plaintiff alleges in her complaint that she sold and conveyed the land in the complaint described to the defendant, for which he promised to pay all liens and encumbrances thereon, and to pay her \$500 upon the delivery of a deed; that the deed has been executed and that \$400 of the purchase-money with interest thereon from the 16th day of January, 1875, is due and remains unpaid. This complaint the defendant answers by a denial, and also avers that the consideration expressed in the deed, to wit, \$3,540, is the true consideration agreed upon by the parties; that he has paid on liens \$3,520, and has paid \$100 to the plaintiff—in all \$3,620. To this answer the plaintiff has replied in denial and also by “plea of coverture, and this forms the issue which you are to try.”

The principal objection urged to this instruction is, that it omits to call the attention of the jury to the plea of payment. This omission was, we think, harmless. It was not claimed by the appellant that anything had been paid other than the \$100, to which the court had called the attention of the jury, and for which the appellee had given him credit in the complaint. There was in fact no controversy about the amount paid. The dispute was as to the terms of the contract. The appellee insisted that the appellant was to pay \$500 in addi-

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tion to all liens upon the land, while the appellant insisted that he was only to pay \$3,540, which he had already done by paying \$3,520 upon liens and \$100 to the appellee. They agreed that aside from the amount paid upon liens only \$100 had been paid. Under these circumstances the omission of the court to call the attention of the jury to the general plea of payment did not injure appellant.

The fifth instruction directed the jury that if they should find that the defendant had overpaid the plaintiff any sum upon the purchase-money, and they should find that she was at the time a married woman, they should not assess any damages against the plaintiff.

This instruction, if erroneous, was harmless. The jury did not find that anything was overpaid, and therefore the instruction did not injure appellant.

The result reached by the jury, as the evidence appears upon paper, does not seem entirely satisfactory; but as the testimony on behalf of the appellee, if believed, was abundantly sufficient to sustain the verdict, we can not disturb the judgment.

For these reasons the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, affirmed in all things, at the appellant's costs.

No. 8399.

BURT v. STATE, EX REL. COOK.

BASTARDY.—Lost Papers.—Complaint.—Warrant.—Justice of the Peace.—Limitations.—In a prosecution for bastardy before a justice, lost papers may be supplied as in civil cases in other courts, R. S. 1881, sections 379, 1456; and, if the papers lost be the complaint and the warrant before service thereof, the prosecution will be deemed as begun with the originals.

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SAME.—Witness.—The defendant in a prosecution for bastardy may be compelled to testify for the prosecution.

From the Henry Circuit Court.

M. E. Forkner and J. Brown, for appellant.

BICKNELL, C. C.—This was a prosecution for bastardy. The child was born June 25th, 1876. On December 13th, 1877, a complaint was filed and a warrant was issued, which was never returned; complaint and warrant were both lost; the defendant could not be found; he left the county on March 31st, 1877, and went to Kansas February 27th, 1878, and was absent from this State more than a year. On May 31st, 1879, a substituted complaint was filed and a substituted warrant was issued, on which the defendant was arrested. He moved before the justice to quash the warrant. The motion was overruled. He was tried before the justice, found guilty, and recognized. In the circuit court the defendant renewed his motion to quash the writ. The motion was overruled. He filed an answer in four paragraphs, to wit:

1st. A denial.

2d. That the cause of action accrued more than two years before the commencement of the suit.

3d. That the child was born more than two years before the commencement of the suit.

4th. A special answer, stating the facts aforesaid, as to the two complaints and warrants, and that the child was born more than two years before the filing of the second complaint.

The issues were tried by a jury, who found for the plaintiff. The defendant's motion for a new trial was overruled; judgment was rendered upon the verdict, and the defendant appealed.

The reasons for a new trial were:

1st. That the verdict was not sustained by the evidence.

2d. That the verdict was contrary to law.

3d. Error of law at the trial, to wit: a.—In refusing to give to the jury charges one, two and three, asked for by de-

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fendant. b.—In giving to the jury the charge of the court No. 2. c.—In overruling defendant's motion to quash the warrant. d.—In compelling the defendant to testify as to the time he was absent from the State after the child was begotten.

Errors are assigned by the appellant as follows :

1st. Overruling the motion for a new trial.

2d. Overruling the motion to quash the writ.

A prosecution in bastardy is regulated by statute, and the mode of proceeding prescribed by the statute must be pursued. *Reeves v. The State, ex rel.*, 37 Ind. 441, 443. But the prosecution is a civil proceeding, and, where the statute makes no provision, is governed by the law regulating civil suits. *The State, ex rel.*, v. *Brown*, 44 Ind. 329 ; *Hawley v. The State, ex rel.*, 69 Ind. 98. The statute provides that, upon the arrest of the defendant, or the return of the warrant, that he can not be found, the justice of the peace shall proceed to hear and determine the complaint. 2 R. S. 1876, p. 654, section 2.

In the present case, the amended transcript shows that the warrant never was returned to the justice, and both warrant and complaint were lost ; for such an emergency there is no provision in the bastardy act ; it must be governed, therefore, by the general rules as to lost pleadings and writs in civil cases. The code, section 93, provides that, if an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original. 2 R. S. 1876, p. 80.

The justice had a right to substitute for the lost complaint a copy thereof, and to substitute for the lost warrant a copy thereof, and the lost warrant not having been served, nor returned, the substitute was the same in the hands of the officer, as the original, and might be executed the same as the original.

The appellant claims that the substituted complaint and warrant made a new suit, and that the old suit was discontinued because the justice failed to proceed therein. But he could not proceed otherwise than he did ; he had neither complaint nor warrant ; he could not try the case in the defend-

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ant's absence until the warrant was served or returned not found; complaint and warrant being both lost, all he could do was to provide substitutes for the lost papers, under section 93 of the practice act.

Proceedings before justices in civil cases, except as otherwise specially provided, shall be governed by the practice and usages of circuit courts, and the rules of the common law so far as the same are in force in this State. Justices' act, section 75, 2 R. S. 1876, p. 630.

A bastardy suit is not ended by the loss of the complaint, nor by the loss or non-return of the warrant, nor by the failure of the justice to docket the case before the return of the warrant. In criminal cases, a justice is not required to docket the case before the warrant is returned. 2 R. S. 1876, p. 670, section 5. The mistake of the justice in following that section in a bastardy case, and waiting for the return of the warrant, and not docketing the case until the filing of the substituted complaint, ought not to oust his jurisdiction. The amended transcript of the justice shows that the original warrant was never returned; the affidavit, on which the motion was made to quash the substituted warrant, shows that the original warrant was lost.

There was no error in substituting the complaint and warrant, and such substitution was not the commencement of a new suit, but merely a continuation of the already existing suit. The court did not err in overruling the appellant's motion to quash the substituted warrant.

It follows that instructions numbered one, two and three, asked for by appellant, were rightly refused.

These instructions asserted substantially that the suit was not commenced until the issuing of the substituted warrant, and that therefore more than two years had elapsed after the birth of the child before the suit was brought, and that the suit was barred by the statute of limitations. Bastardy act, section 18, 2 R. S. 1876, p. 661.

It follows, also, that there was no error in the instruction

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numbered two, given by the court, to wit, that the defence of the statute of limitations was not made out.

And there was no error in compelling the appellant to testify; this being a civil proceeding he would have been a competent witness, even in his own behalf. *The State, ex rel., v. Evans*, 19 Ind. 92.

The evidence fully sustained the verdict and was not contrary to law. *Miller v. The State, ex rel.*, 71 Ind. 601. There was no error in overruling the motion for a new trial. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things affirmed, at the costs of the appellant.

No. 8595.

EASTES v. EASTES.

DIVORCE.—Order of Circuit Court.—Dismissal of Appeal.—The failure of the defendant to comply with an order of the circuit court, requiring him to pay into court a certain sum of money to enable the plaintiff to prosecute her cause before the Supreme Court, if the same should be appealed by him to that court, affords no sufficient ground for the dismissal of such appeal.

SAME.—Practice.—Summons, when Returnable.—Motion to Quash.—Notice.—The provisions of section 315 of the civil code of 1852, as amended by the act of March 6th, 1877 (Acts of 1877, Reg. Sess., p. 105; section 516, R. S. 1881), in relation to the issue and service of process, have no application to suits or proceedings for divorces; but these are governed by the provisions of the divorce law of March 10th, 1873. 2 R. S. 1876, p. 324; article 37, R. S. 1881. The fact that the summons is issued for a day in term other than the first day will afford no sufficient ground for quashing the writ, but its service will be a sufficient notice of the pendency of the suit for the next ensuing term of the court.

SAME.—Affidavit of Plaintiff's Residence and Occupation.—Motion to Dismiss.—The provisions of the last sentence of section 7 of the divorce law (section 1031, R. S. 1881), in relation to an affidavit of the plaintiff's resi-

79	363
138	257
79	363
141	307
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154	205

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dence and occupation, are so far mandatory as to require a substantial compliance therewith. But where the objections to such affidavit relate chiefly to formal matters, and a substituted affidavit is filed in substantial conformity with the requirements of the statute, a motion to dismiss or to quash the summons, for the want of a sufficient affidavit, is correctly overruled.

SAME.—*Cause for Divorce.—Cruel and Inhuman Treatment.*—For what constitutes cruel and inhuman treatment of the wife by the husband, within the meaning of the divorce law, see the opinion.

SAME.—*Admissibility of Evidence.—Failure to Provide.*—Evidence of the husband's failure to provide suitably for the support of his wife and infant child, according to his ability, is admissible as tending to prove that his treatment of his wife is cruel and inhuman.

SAME.—*Alimony.—Support of Infant Child.*—Allowances for alimony, and for support of infant children, are largely within the discretion of the trial court, and the Supreme Court will not interfere therewith unless a clear abuse of discretion is shown.

From the Hendricks Circuit Court.

T. S. Adams, for appellant.

L. M. Campbell, for appellee.

Howk, J.—This suit was commenced by the appellee, on the 14th day of October, 1879, to obtain a divorce from the appellant, her husband, the custody of their infant son, and alimony in the sum of \$5,000. The appellant appeared, and such proceedings were had in the cause as that, on the 29th day of January, 1880, the issues joined were tried by the court, and a finding was made for the appellee, that the allegations of her complaint were true, and entitled her to the relief therein demanded, and the court assessed her alimony in the sum of \$300.00, and the amount necessary to maintain the infant son of the parties at the sum of \$1,200. Thereupon the court rendered a judgment and decree dissolving, annulling and setting aside the marriage contract, theretofore entered into and then subsisting between the said parties, and for the payment of said alimony and costs, and requiring the appellant to pay the appellee for the support and education of their infant son the sum of \$100 on the first day of February, in each year, during the period of twelve years.

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Before considering any of the questions presented by the appellant's assignment of errors, it is proper that we should dispose of a point made in argument by appellee's counsel. The record shows that, after the circuit court had rendered the decree of divorce in this cause, on the appellee's motion, the court ordered that the appellant should pay into court \$50 for the appellee, to enable her to prosecute this case before the Supreme Court, in case the same should be appealed by him to this court. The clerk of the court below has appended his certificate to the transcript of the record, to the effect that the appellant had paid no money into his hands for the use of the appellee. Upon this showing, the appellee's counsel asks that this court will dismiss this appeal. Conceding, without deciding, that it is sufficiently shown that the appellant is prosecuting this appeal in contempt of the order of the circuit court, we are of the opinion that this action of the appellant would not authorize us to dismiss his appeal. The circuit court has full power by law to enforce its orders, and to punish, if necessary, a wilful disobedience thereof. But we know of no law which would authorize this court to dismiss the appeal in this case, for the reason that the appellant had failed, for some cause not shown, to comply with the order of the court below.

It appears from the record of this cause, that the appellee's complaint was filed in term time, to wit, during the September term, 1879, of the court below, with the following endorsement thereon, signed by her attorney, to wit: "The clerk will issue summons in the within cause, returnable on the 24th of October, 1879, and set said cause down for trial on said day."

Neither the summons nor the return thereof appears in the transcript before us, and it does not appear that there was any appearance or any action had in the cause until the January term, 1880, of said court. On the 10th day of that term, to wit, on January 15th, 1880, the appellant, by his counsel, entered a special appearance, and moved the court to quash the summons issued in said cause, which motion was overruled, and to this ruling he excepted, and filed his bill of exceptions.

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This decision of the court is assigned as error by the appellant.

The first point made by the appellant's counsel, in his brief of this cause, is that the act of March 6th, 1877, amending section 315 of the civil code of 1852, in regard to process or publication in civil actions, is not applicable to suits or proceedings for divorces. In said section as amended, it was provided that the plaintiff might, when he filed his complaint before or during any term of the court, fix the day during such term, by endorsement thereof on his complaint, upon which the defendant should appear, which day, when so fixed, should be stated in the summons issued, and the action should be docketed accordingly. It was further provided in said amended section, that if the summons should be personally served ten days before the day so fixed, or if publication should be made for three weeks, thirty days before such day, such action should thereupon stand for issue and trial at such term, and the court should have jurisdiction to hear and determine the same, as if such summons had been served or such publication made before the first day of the term. Acts of 1877, Reg. Sess., p. 105. This amended section was substantially re-enacted, with some additional provisions, as section 367 of the civil code of 1881, and is now section 516 of Revised Statutes of 1881. We agree with the appellant's counsel in the opinion that the amended section 315 had and has no application whatever to suits or proceedings for divorces. Such suits or proceedings were governed and controlled by the provisions of the act of March 10th, 1873, "regulating the granting of divorces," etc. 2 R. S. 1876, p. 324.

In section 13 of said act, it was provided as follows: "The cause shall stand for issue and trial at the first term of the court after the summons has been personally served upon the defendant ten days, or publication has been made thirty days before the first day of such term." 2 R. S. 1876, p. 329. This is now section 1037 of the Revised Statutes of 1881, p. 198. But we do not agree with appellant's counsel in his conclusion, that, because the summons in this case was issued in

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term time and made returnable to a future day in the same term, it was therefore inoperative and wholly void. This seems to us to be clearly a *non sequitur*. It has always been the law, in a free country, that the courts were open at all times for the institution of suits, as well in term time as in vacation; and where, as in this case, the suit was commenced in term time, the process issued would be made returnable at that term, unless otherwise ordered. In such cases, if the process were served either before or after the close of the term, the effect of such service would be the same, namely, the continuance of the cause, by operation of law, until the next succeeding term of the court. In the case at bar, the appellee made no effort to prosecute her suit, and the appellant did not appear therein, specially or otherwise, at or during the term of the court in which he had been summoned; but the cause seems to have been then continued, and, in the absence of anything appearing to the contrary, we may reasonably assume, for the reason that it appeared that the summons had not been personally served upon the appellant ten days before the first day of the then term of the court. The summons and the service thereof, as it seems to us, were sufficient notice to the appellant, under the law, of the pendency of appellee's suit for the January term, 1880, of the circuit court.

The appellant's counsel further insists, that the summons ought to have been quashed, and the suit dismissed, for the reasons assigned in his written motion therefor. These reasons were, in substance, as follows:

1. Because the affidavit, filed with appellee's complaint, was sworn to before a notary public, and not before the clerk of the circuit court, as contemplated by the statute;
2. Because said affidavit was dated on April 27th, 1879, nearly six months prior to the date of the filing of said complaint and affidavit; and,
3. Because there was no affidavit filed with appellee's complaint, showing that she was a resident of Hendricks county, Indiana, at the time she commenced this suit.

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The appellee responded to the motion of the appellant by a counter motion for leave to file a substituted affidavit, which latter motion was sustained by the court; and thereupon she filed such affidavit, sworn to before the clerk of said court, on the 3d day of January, 1880. In this affidavit the appellee stated in substance, that she then was and had been during her whole life a *bona fide* resident of said Centre township, in said Hendricks county; that her affidavit, theretofore filed in this cause, on October 14th, 1879, was made and subscribed by her on April 26th, 1879, in good faith, for the purpose of being filed with her complaint, and was left with her attorney until said suit was commenced; that the sole cause of her delay in the commencement of her suit was the hope of herself and her attorney that she and appellant might become reconciled and that no suit would be necessary.

In discussing the questions arising under his written motion to quash the summons and dismiss the suit, appellant's counsel founds his argument upon the provisions of the last sentence of section 7 of the divorce act of March 10th, 1873, 2 R. S. 1876, p. 326; section 1031 of Revised Statutes of 1881. This sentence reads as follows: "And the plaintiff shall, with his petition, file with the clerk of the court, an affidavit subscribed and sworn to by himself, in which he shall state the length of time he has been a resident of the State; and stating particularly the place, town, city or township in which he has resided for the last two years past; and stating his occupation, which shall be sworn to before the clerk of the court in which said complaint is filed." It is claimed by counsel that these provisions of the statute are mandatory, and we are of the opinion that they are so far imperative as that there should be, in every case, a substantial compliance with their requirements. Manifestly, the legislative intent in the enactment of these provisions was to limit the operation of the statute to *bona fide* residents of the State, and to restrain and prevent the procurement of divorces by non-residents, through fraud or imposition practiced on the courts. Such substantial com-

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pliance with the terms of the statute as may be necessary to carry out and accomplish the purpose and intention of the Legislature, the courts should encourage and require; but we fail to see that any good result would or could be accomplished by giving these statutory provisions the literal or rigid construction which the appellant's counsel insists should be placed upon them.

In the case now before us, there was certainly no error, prejudicial to the appellant's rights or interests, in the proceedings of the court, either in overruling his motion to quash the summons and dismiss the suit, or in permitting the appellee to file with her complaint a substituted affidavit. In our opinion, any other action on the part of the court, under the circumstances of this case, would have been error so gross as to have amounted practically to a denial of justice. The appellant's written motion to quash the summons, and dismiss the suit, was correctly overruled.

The next error complained of, in argument, by appellant's counsel, was the decision of the court in overruling his demurrer to appellee's complaint. It was alleged by appellee, in her complaint, that, at all times since her marriage to appellant, she had performed all her duties as his wife, and had at all times been, and then was, ready and willing to perform her duty as a wife toward the appellant; but she averred that appellant had broken his marriage contract and had treated appellee in a cruel and inhuman manner, in this, that, in June, 1878, the appellant without cause left and abandoned appellee and her infant child, and absconded from this State to some distant, and to her unknown, State or territory, and without any explanation, excuse, or correspondence with her, left her dependent upon herself and her friends for the support of herself and said infant child; that, from that time to the commencement of this suit, appellant had not provided any means of support for either her or said child; that, during said time, appellee had been seriously ill and greatly in

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need of assistance, and of the society, nursing and comfort of her husband; and that, notwithstanding all this, the appellant had grossly and cruelly neglected her, and still neglected and refused to live with her, or to support and provide for her in any degree.

In section 8 of the divorce act of March 10th, 1873, which is section 1032 of the Revised Statutes of 1881, the causes for which divorces may be decreed are specified, and it is declared that they shall be decreed for "no other" causes. It is manifest from the allegations of appellee's complaint or petition, in this case, that she relied for a divorce upon the *fourth* and *fifth* statutory causes therefor. These causes were as follows:

"*Fourth*. Cruel and inhuman treatment of either party by the other.

"*Fifth*. Habitual drunkenness of either party, or the failure of the husband to make reasonable provision for his family."

The latter part of this *fifth* cause is repeated as the *sixth* statutory cause for a divorce, as follows: "*Sixth*. The failure of the husband to make reasonable provisions for his family, for a period of two years."

We are of the opinion that the allegations of appellee's complaint were sufficient to constitute a cause of action in her behalf for a divorce from the appellant, and to withstand his demurrer thereto for the want of facts, under the *fourth* statutory cause for a divorce. If it be true, as alleged, and the demurrer admits its truth, that the appellant without cause, and within three years after his marriage to appellee, abandoned her and her infant child, absconded from the State, and without explanation, excuse or even correspondence with her, left her dependent upon her own labor and the charity of friends for the support of herself and child, it may well be said, as it seems to us, that his "treatment" of her was sufficiently "cruel," within the meaning of the statute, to entitle her to a decree of divorce. To a sensitive, spirited woman, such treatment would be far more cruel and inhuman than the infliction of corporal

punishment or of severe injuries to her person ; for mental suffering and public shame and disgrace are more difficult to be borne than mere physical pain. We are aware that a different view from the one here expressed has been taken by an eminent writer on the law of marriage and divorce, in reference to the nature and extent of the cruel treatment which would entitle the complaining party to a divorce. Thus, in 1 Bishop on Marriage and Divorce, section 717, it is said : " Cruelty, therefore, is such conduct in one of the married parties as endangers, either apparently or in fact, the physical safety or health of the other, to a degree rendering it physically or mentally impracticable for the endangered party to discharge properly the duties imposed by the marriage." This definition of cruelty, as a ground for divorce, is undoubtedly good as far as it goes, but it will not do to say, we think, that this definition includes every species or form of " cruel and inhuman treatment," for which, under our statute, either party to the marriage may obtain a divorce.

In the recent case of *Graft v. Graft*, 76 Ind. 136, it was held by this court, and correctly so, as it seems to us, that false charges of adultery, publicly made by the husband against his wife, were cruel and inhuman treatment of the wife, within the meaning of that expression as used in the statute, such as authorized the trial court to grant her a divorce from the husband on the ground of such treatment. To the same effect is the case of *Shores v. Shores*, 23 Ind. 546. The appellant's treatment of the appellee, as alleged in the complaint in this case, is fully as cruel and inhuman as the treatment of the wives in the cases cited. For here the appellant abandons his wife without cause, and leaves her to support herself and child, and to endure the sneers and scoffs of others as to her unfortunate condition as best she can. The court did not err, we think, in overruling the demurrer to appellee's complaint or petition, for the want of sufficient facts therein.

The other ground of demurrer was, that the court had no jurisdiction of the subject-matter of the suit. This ground

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of objection to the complaint, even if it existed, was not apparent on the face of the complaint, and, therefore, it could not be reached by demurrer. It is evident, however, from the brief of appellant's counsel, that, by this ground of demurrer, although it was addressed to the complaint alone, it was intended to reach certain supposed irregularities in the affidavit filed with the complaint. These supposed irregularities were obviated and cured by the filing of the substituted affidavit; but, if they had not been, it is certain they were not reached by the demurrer to the complaint.

It is earnestly insisted by the appellant's counsel, that the finding of the court was contrary to law, and was not sustained by sufficient evidence; but his argument is based upon the theory, that, even if every allegation of the complaint were strictly true, the appellee would not be entitled to a divorce, under the law. We have reached the conclusion, however, that appellee's complaint stated a cause of action, entitling her to a divorce from the appellant, under the law; and the evidence in the record, as we read it, tended to establish this cause of action more strongly in her favor than it was stated in her complaint. For the evidence not only showed the appellant's treatment of the appellee to be fully as "cruel and inhuman" as she had stated in her complaint; but it also showed, that the effect of such treatment was to prostrate her with serious sickness for a long time.

Appellant's counsel claims that the trial court erred in the admission of evidence of the entire failure of the appellant to provide for the support of the appellee and of her infant child. We think, however, that this evidence was admissible as tending to prove the appellant's treatment of the appellee to have been cruel and inhuman.

We can not disturb the court's allowance of alimony, or its allowance for the support of the appellant's child. In *Powell v. Powell*, 53 Ind. 513, it was said of such allowances: "These matters are both, of necessity, largely within the discretion of the court below; and the abuse of that discretion must be very

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clear indeed, to justify this court in interfering with its exercise." We can see no such abuse of discretion in the case at bar. *Conn v. Conn*, 57 Ind. 323.

Appellant's counsel concedes, in his brief of this cause, that the questions presented by the alleged error of the court, in overruling the motion in arrest of judgment, are precisely the same as those which were presented by the supposed error of the court, in overruling the demurrer to the complaint. Upon those questions, we have already said all that we desire to say. Besides, the record shows that the motion in arrest was not made in this case, until five days after the rendition and entry of the judgment. This court has held, that a motion in arrest must be made before, and can not be made after, the rendition and entry of the judgment. *Hilligoss v. The Pittsburgh, etc., R. R. Co.*, 40 Ind. 112.

We have found no error in the record of this cause, requiring the reversal of the judgment below.

The judgment is affirmed, at the appellant's costs.

WOODS, J., dissenting, says: I do not think the complaint shows a cause for divorce, on the ground of cruel treatment. The statute has expressly provided for divorce, on the ground of abandonment and failure to provide, which must be for two years; and we have no right to call it by another name, and so reduce the time of abandonment below the period fixed in the statute.

No. 10009.

SHOULTZ v. MCPHEETERS.

MASTER COMMISSIONER.—*Constitutional Law.—Habeas Corpus.*—So far as the statute, section 1404, R. S. 1881, confers judicial power on the master commissioner, *e. g.*, to grant writs of habeas corpus, it is in conflict with the Constitution and therefore void.

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130	200
79	373
131	482
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186	248
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181	241

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SAME.—Practice.—On appeal from the order of a master commissioner in a proceeding before him in habeas corpus, remanding a prisoner to the custody of the sheriff, the Supreme Court will affirm the judgment.

From the Washington Circuit Court.

F. L. Prow, V. M. Hobbs and W. Hultz, for appellant.

S. B. Voyles and H. Morris, for appellee.

ELLIOTT, C. J.—The civil code of 1881 provides for the appointment of master commissioners by the judges of the circuit courts of the State, and invests them with various powers and imposes upon them important duties. Section 419 is as follows: "Whenever the office of judge shall become vacant, or, in case of the absence of all the judges competent to act, or whenever such judge or judges, by reason of interest, is or are incompetent to act, or unable by reason of sickness, such master commissioner shall have all the power of any judge in vacation, to grant restraining orders, injunctions, writs of *habeas corpus*, and writs of *ne exeat*, and to appoint receivers, and hear and determine all motions and matters, and make all orders concerning the same." R. S. 1881, section 1404.

This section is in direct conflict with the letter and spirit of the Constitution of the State, and is utterly void.

Scrupulous care was taken by the framers of our Constitution to distribute the powers of government, and to define and fix the rights and powers of the great departments to which these rights and powers were distributed. The boundaries of each are marked with certainty and precision. There can be no doubt where the judicial power is vested. Section 1, of article 7, as originally framed, read thus: "The judicial power of the State shall be vested in a Supreme Court, in circuit courts, and in such inferior courts as the General Assembly may establish." On the 14th day of March, 1881, the electors of the State, at a special election held on that day, ratified an amendment to the section and article named. This amendment reads as follows: "The judicial powers of the

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State shall be vested in a Supreme Court, circuit courts, and such other courts as the General Assembly may establish." All judicial powers are, by force of this provision, vested in the courts of the State. The Legislature has no authority to invest any other tribunals than the courts with judicial powers.

It is certain that the Legislature can not exercise judicial powers. *The Columbus, etc., R. W. Co. v. The Board, etc.*, 65 Ind. 427; *Doe v. Douglass*, 8 Blackf. 10; *Young v. The State Bank*, 4 Ind. 301. Nor can these powers be vested elsewhere than in the tribunals designated or indicated by the Constitution. Judicial powers can not be delegated. Taking and following as guides these fundamental principles, we are led to the conclusion that judicial powers can not be vested in officers, such as master commissioners, appointed by the judges of the courts.

By the express provision of the paramount law, the whole judicial power of the State is vested in courts. Blackstone, following Lord Coke, says: "A court is defined to be a place where justice is judicially administered." 3 Com. 24. Of this statement it was well observed by the court, in *Hobart v. Hobart*, 45 Iowa, 501: "But this definition obviously wants fulness. * * In addition to the place, there must be the presence of the officers constituting a court, the judge or judges certainly." In legal contemplation there can not be a court without a judge or judges. Bouvier says: "The one common and essential feature in all courts is a judge or judges, so essential, indeed, that they are even called *the court*." An English book says: "In these courts the sovereign is supposed in contemplation of law to be always present; or at least is there represented by the judges, whose power is but an emanation of the prerogative." 2 Broom & H. Com. 21. In *The Michigan, etc., R. R. Co. v. The Northern, etc., R. R. Co.*, 3 Ind. 239, it was said that the terms *court* and *judge* are generally synonymous. The predominant idea in all the definitions of the courts and the text-writers is, that a court is a tribunal organized for the purpose of administering justice,

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and presided over by a judge or judges. Webster's definition is: "An official assembly, legally met together for the transaction of judicial business; a judge or judges sitting for the hearing or trial of causes." Our Constitution means by the term *court* judicial tribunals presided over by a judge or judges. Section 2, of article 7, provides that the Supreme Court shall not consist of less than three nor more than five judges. Section 8 directs that the circuit courts shall each consist of one judge. Section 10 declares that the General Assembly may provide by law that the judge of one circuit may hold the courts of another circuit, and section 14 makes provision for justices of the peace. Throughout all the constitutional provisions runs the controlling idea that a court can not exist without a judge. The Legislature may establish courts, but can not vest the judicial power in any other tribunals.

A master commissioner is not a court, and judicial duties which courts only can exercise, can not be conferred upon him. This seems so plain upon principle that the support of authority is not needed. But authorities are not wanting. In *Hall v. Marks*, 34 Ill. 358, a statute was held to be unconstitutional which attempted to confer authority upon the clerk to enter judgment in actions upon written contracts where the amount of the recovery was fixed by the contract, and in cases where the defendant failed to appear and suffered default. The court there said: "The consideration of the facts, and the application of the law to those facts, and the conclusion deduced by the court from the law and the facts constitute a judgment. The power to announce and have enforced this conclusion has been confided exclusively to the judiciary of our State government." In *Chandler v. Nash*, 5 Mich. 409, it was held that a statute, assuming to confer judicial powers upon a notary public, was unconstitutional and void. The court said: "This presents the naked question, whether the legislature possessed the constitutional power to confer such jurisdiction upon the notary. The proceeding authorized by the statute first cited,

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for dissolving attachments, is as clearly a judicial proceeding as the trial of a cause in any court of the State; and the power 'to hear and determine' such application under the statute, is as clearly a judicial power as that exercised by a justice of the peace or a judge upon the bench. It is not like a mere reference to take proof or compute amounts to be reported to a court of record for their judicial action, but it is, 'to hear and determine,' questions both of law and fact. Section 1, art. vi, of the constitution, declares: 'The judicial power is vested in one Supreme Court, in Circuit Courts, in Probate Courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature, in cities.' This, beyond all controversy, vests the *whole* judicial power of the State in the courts and officers named in this section, unless there be some further provision in the same constitution, conferring upon some other court or officer a part of such judicial power, or authorizing the legislature to confer it; and in the latter case, it can only be possessed or conferred by such further provision expressly, or by necessary implication, which would have the effect to take the case out of the general provision above quoted. This must be so upon principle, or the constitution itself must be subject to legislative repeal. It is also well supported by authority. See 2 Story on Const., secs. 1590 to 1592; *State v. City of Rockford*, 14 Ill. 420; *Gibson v. Emerson*, 2 Eng. 173." The views expressed in the cases cited are in harmony with the rule long since declared by this court. In *Flournoy v. The City of Jeffersonville*, 17 Ind. 169, it was said: "Judicial acts, within the meaning of the Constitution of Indiana, are such as are performed in the exercise of judicial power. But the judicial power of this State is vested in courts. A judicial act, then, must be an act performed by a court, touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of ministerial officers, in short, by ministerial acts. See *Waldo v. Wallace*, 12 Ind. 569, where the constitutional provisions are quoted. The acts done out of court, in bringing parties into

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court, are, as a general proposition, ministerial acts ; those done by the court in session, in adjudicating between parties, or upon the rights of one in court *ex parte*, are judicial acts. 3 Blacks. Comm., p. 25."

The power to hear causes and report facts or conclusions to the court for its judgment is not judicial within the meaning of the Constitution. In *Underwood v. McDuffee*, 15 Mich. 361, this subject received a careful investigation, and it was there said: "No action which is merely preparatory to an order or a judgment to be rendered by some different body, can be properly termed judicial. A master in chancery often has occasion to consider questions of law and of fact, but no one ever supposed him to possess judicial power. A jury in a court of record determines all the facts in the case, but the judicial power is in the court which enforces the verdict by judgment. This view is very clearly explained by KENT, C. J., in *Tillotson v. Cheetham*, 2 Johns. 63, where it was held that the sheriff himself when presiding over a jury of inquest, acted ministerially, because he had no power to give judgment. See also Story on Const., sec. 1640, and seq.; *Daniels v. People*, 6 Mich. 381; *Chandler v. Nash*, 5 Mich. 409. It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on persons or things only through its action, and by virtue of it."

The provisions of the act of 1881, concerning the reference of matters to master commissioners, come fully within the principle declared by the court in the case from which we have quoted. The powers enumerated in section 419 are, however, clearly judicial within the definition there given. The vice in this section is, that it assumes to confer upon the master commissioner power to make binding orders and judgments in judicial proceedings, and this can be done only by the courts of the State.

It is undoubtedly true, that there are many cases in which

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powers in their nature judicial, may be conferred upon officers and inferior tribunals. *Quasi* judicial powers may be conferred upon tribunals which are not courts in the strict sense of the term. This is well illustrated in the case of *The United States v. Ferreira*, 13 How. 40. But the section of the statute here under examination does much more than this; for it assumes to confer authority to exercise functions and powers, which are purely and strictly judicial. These can only be possessed and exercised by the courts.

We have had some difficulty in determining what disposition should be made of this cause; whether we should dismiss the appeal or affirm the decision of the master remanding the appellant to the custody of the sheriff. It is true that the commissioner was not a court, but it is also true that the Legislature assumed to vest him with the powers of a court. Parties have a right to a judicial determination of the validity of such a statute as that under which the commissioner acted. It must be further noted that the statute gives a general right of appeal from all final orders or judgments in *habeas corpus* proceedings. *Henson v. Walts*, 40 Ind. 170. The case in hand is entirely unlike that of a person attempting to exercise the powers of a court without the shadow of right or color of authority. There was here color of right, for the Legislature of the State assumed to vest the officer with power to do the act appealed from. We think either party has, in such a case, a right to an adjudication upon the constitutionality of the statute. If the commissioner's final decision had been adverse to the sheriff, the appellee, he could surely have maintained an appeal. He was not bound to treat the order of the master as void, although he might have done so if he chose. A void judgment may be appealed from. *Shoemaker v. Board, etc.*, 36 Ind. 175. If the appeal had been by the sheriff, from an adverse decision, the proper judgment would have been one reversing the decision of the commissioner. Where the decision secures a correct result, we think

Vance *et al.* v. Schroyer *et al.*

an affirmance is proper, although it might not be improper to simply dismiss the appeal.

The master commissioner, to whom the appellant made his application for a writ of *habeas corpus*, had no jurisdiction. He had no right to entertain the petition. The result reached was, however, the correct one, for the appellant was rightly remanded to the custody of the sheriff. If the commissioner had remanded the appellant upon the ground that he had no jurisdiction, the result reached would have been the same as that arrived at by him upon the evidence. The appellant is properly in custody, and by affirming the action of the commissioner we leave him there. Affirmance, therefore, leads to the correct result. Where the record shows that the court, or officer, has no jurisdiction, there is no reason for sending back the case, for no steps could be taken in it if it were back in the inferior tribunal. There are cases where it would not be proper to affirm upon the assignment of cross errors, but to that class this case does not belong. On the contrary, it is one where it is proper to affirm on the appellee's assignment of cross errors.

The decision of the commissioner remanding the appellant is affirmed.

WOODS, J., doubts the conclusion.

79	380
126	568
79	380
151	343

No. 8263.

VANCE ET AL. v. SCHROYER ET AL.

CONTRACT.—*Rescission*.—*Fraud*.—*Restoration*.—A party who desires to rescind a contract on the ground of fraud must restore, or offer to restore, what he has received on the contract, so as to place the other party, as near as may be, in *statu quo*.

SAME.—*Heirs*.—*Fraudulent Conveyance of Ancestor*.—*Consideration*.—*Offer to Restore Notes*.—*Complaint*.—A complaint of heirs to set aside a convey-

Vance et al. v. Schroyer et al.

ance fraudulently made by their ancestor, which shows that the consideration was evidenced by the notes of the grantee, must show an offer by some one to restore the notes.

SAME.—In such case, the heirs stand in no better position than their ancestor would occupy if alive and prosecuting the action.

QUERY.—*Attempted Fraud.—Misrepresentation of Matter of Law.*—If a wife, advised by her husband that a conveyance of her real estate is necessary to prevent its sale for his debts, join with him in such conveyance, does such false representation of a matter of law furnish a ground for setting it aside, or extenuate her attempted fraud?

From the Boone Circuit Court.

C. C. Nave, for appellants.

J. W. Clements and *O. P. Mahan*, for appellees.

WORDEN, J.—On March 13th, 1877, Amanda Vance was the owner of a forty-acre tract of land in Boone county, Indiana, of the alleged value of \$1,800, and on that day she and her husband, David M. Vance, joined in a conveyance of it to Ezra H. Smith.

Amanda Vance having died, this action was brought by her heirs, who, being infants, sued by their next friend, to set aside the conveyance thus made.

The ground on which it was sought to set aside the conveyance is thus stated in the complaint: "And the defendant David M. Vance, the husband of the said Amanda Vance, being indebted to Maddox & Co., in the sum of \$400, and the defendants David M. Vance and Ezra H. Smith, combining and confederating together for the purpose of cheating and defrauding her, the said Amanda Vance, and her heirs at law (the above named infants), out of the above described real estate, and their separate interest therein upon the death of their mother, Amanda Vance, and for that purpose and fraudulent intention, did, by advice of an attorney, procure the said Amanda Vance to convey by deed, executed by her and defendant David M. Vance, on the 13th day of March, 1877, to defendant Ezra H. Smith, the above described forty-acre tract of land (a copy of which is filed herewith and made a part of this complaint, marked 'A'), by then and there falsely

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and fraudulently stating and representing to her, the said Amanda Vance, that, if she did not convey the said forty-acre tract of land by deed to the defendant Ezra H. Smith, Maddox & Co. would cause the same to be sold to pay off and satisfy their claim for \$400 then due to them from the defendant David M. Vance, the husband of her, the said Amanda Vance, and for the purpose of preventing the said Maddox & Co. from disposing of, and selling under the law, the above described forty-acre tract of land, to pay off and discharge the indebtedness of her husband, David M. Vance, to said Maddox & Co., and not knowing that her, the said Amanda Vance's, separate property was not liable to sale, and could not be sold under the law, to pay off and discharge the indebtedness of her husband, David M. Vance, to Maddox & Co., or any creditor of him, defendant David M. Vance. Wherefore the said Amanda Vance was induced, under the advice of the defendants David M. Vance and Ezra H. Smith, and their attorney, so given as aforesaid, to convey the above tract of land to defendant Ezra H. Smith, he, the said Ezra H. Smith, agreeing at the time of the execution of said deed as aforesaid, that he would buy or get a tract of land in Ohio for her, Amanda Vance, in consideration of the conveyance to him by Amanda Vance of the above described forty-acre tract of land in Boone county, Indiana. And for the purpose of preventing the creditors of defendant David M. Vance from making sale of said forty-acre tract of land above described, or in any way taking the same away from her, the said Amanda Vance and her infant children, the defendant Ezra H. Smith, on the 13th day of December, 1877, executed his two several promissory notes for \$600 each, drawing six per cent. interest from the date thereof, both payable to Amanda Vance or to her order; * * * that said Amanda Vance continued in the possession of the above described tract of land up to the time of her death (Dec. 10th, 1878), and since the death of the said Amanda Vance the said David M. Vance has been and now is in the possession thereof, and that the defendant Ezra H.

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Smith has never been in the possession of the above described forty-acre tract of land or any part thereof, all of which actings and doings of said defendants Ezra H. Smith and David M. Vance were done and performed for the purpose aforesaid."

Further allegations in the complaint show that on a proceeding in the Boone Circuit Court for the partition of the land mentioned, it was ordered to be sold and the proceeds divided, after payment of costs, as follows: One-half to be paid over to Julia Alexander, one-third to Elizabeth Schroyer, and one-sixth to Ezra H. Smith.

Julia Alexander and John T. Alexander, and Elizabeth Schroyer and Daniel Schroyer, demurred to the complaint for want of sufficient facts, and the demurrers were sustained, and final judgment was rendered for them.

The sustaining of these demurrers is the only supposed error complained of.

We are of opinion that no error was committed in sustaining these demurrers.

The heirs of Amanda Vance stand in no better position than she would occupy were she alive and prosecuting the action. The substance of the case made is that Amanda Vance was made to believe that her land was liable to be sold for the payment of her husband's debts; and, so believing, she united with her husband in the conveyance of it to Ezra H. Smith, in order to put it beyond the reach of her husband's creditors. The land, to be sure, may not have been liable for the husband's debts; but, had it been, would not the fraud on her part in making the conveyance for the purpose indicated be such as to preclude her from setting it aside? Is the attempted fraud on her part extenuated by the fact that the land was not liable for the husband's debts? Again, was the representation to her, that the land was liable to be sold for her husband's debts anything more than the representation of a matter of law, and does it furnish any ground for setting aside the conveyance? These are questions which we find it

Kirkpatrick v. Armstrong *et al.*

unnecessary to answer, or express any opinion upon, as in other respects the complaint is radically defective.

A party who desires to rescind a contract on the ground of fraud must restore or offer to restore what he has received on the contract, so as to place the other party, as near as may be, *in statu quo*. The authorities are numerous on this point. We cite one that happens to be at hand. *DeFord v. Urbain*, 48 Ind. 219.

It does not appear from the complaint, whether or not the plaintiff's ancestor got the land in Ohio which she was to have, or how much, if anything, was paid upon the two \$600 notes. If she did not get the Ohio land, and if she was paid nothing upon the notes, still there should have been an offer by some one authorized to make it, to restore the notes given by Smith for the land, before a rescission could be demanded. *McGuire v. Callahan*, 19 Ind. 128.

There may be other objections to the complaint, but what we have said is sufficient to show that the ruling on the demurrers was correct.

The judgment below is affirmed, with costs.

No. 8188.

KIRKPATRICK v. ARMSTRONG ET AL.

PRACTICE.—*Open and Close.*—*Principal and Surety.*—In an action against a principal and his surety upon an obligation which showed on its face the suretyship, the principal answered by a general denial, and the surety by pleas in confession and avoidance only.

Held, that the plaintiffs were entitled to open and close. The general rule is, that the open and close belongs to the one who in order to prevail must offer proof; to the plaintiff, if upon any issue joined upon his complaint he has the burden of proof.

SAME.—*Pleading.*—In such action an answer by the principal enures to the benefit of the surety.

From the Howard Circuit Court.

Kirkpatrick v. Armstrong *et al.*

N. R. Lindsay and T. A. DeLand, for appellant.

R. Vaile and J. F. Vaile, for appellees.

WOODS, J.—The appellant insists upon a single cause for a new trial, namely, that the court erred in denying him the open and close of the evidence and argument upon his separate defence.

The action was against the appellant and one Giles, for the breach of a contract, which was pleaded as the basis of the complaint and which purported to have been executed by Giles as the principal obligor, and by the appellant as surety. The defendants each appeared and answered separately, Giles by a general denial, and the appellant by pleas in confession and avoidance.

Upon these issues the plaintiffs clearly had the burden of proof and were entitled to the open and close. It is apparent on the face of the complaint that the appellant was bound as surety only, and, there being no claim that his principal was not bound by the contract, on account of infancy or other personal ground of defence, the appellant could be liable only to the same extent as the principal obligor. It follows that the answer of Giles enured to his benefit. It made an issue in his favor, the burden of which was on the appellees. *Sutherland v. Mullis*, 17 Ind. 19; *Mullendore v. Silvers*, 34 Ind. 98; *Stapp v. Davis*, 78 Ind. 128. See, also, *Rose v. Comstock*, 17 Ind. 1.

Under the general rule, that the open and close belong to the party which must offer evidence in order to prevail, the plaintiff has that right, if proof is necessary in reference to any issue joined upon his complaint, or in reference to the amount of his recovery. *Heilman v. Shanklin*, 60 Ind. 424; *Jackson v. Pittsford*, 8 Blackf. 194; *Zehner v. Kepler*, 16 Ind. 290; *Judah v. Trustees of Vincennes University*, 23 Ind. 272; *Bowen v. Spears*, 20 Ind. 146; *Fetters v. Muncie Nat. Bank*, 34 Ind. 251; *Hamlyn v. Nesbit*, 37 Ind. 284; *Williams v. Allen*, 40 Ind. 295.

Judgment affirmed, with costs.

Gordon v. Carter.

No. 8650.

GORDON v. CARTER.

79	386
154	412

PLEADING.—Parties.—Contract.—Assignment.—A complaint on a written contract assigned in writing, but not by indorsement, is, under the statute (R. S. 1881, section 276), bad on demurrer, unless the assignor be made a defendant thereto.

From the Howard Circuit Court.

M. Bell, M. McDowell and J. W. Sansberry, for appellant.
N. R. Lindsay and H. D. Thompson, for appellee.

NIBLACK, J.—This action was commenced by Samuel Carter in the Madison Circuit Court, and, upon a change of venue, was transferred to the court below.

The complaint charged, that in December, 1875, the defendant, Norman Gordon, and one Marshall Cade entered into a contract in writing, by which the said Cade sold and agreed to deliver to the defendant, at Indianapolis, on or about the first half of September, 1876, two hundred smooth, merchantable, well corn-fatted hogs, to weigh not less than two hundred and fifty pounds gross weight, and to be delivered upon three days' notice at one of two named places in Indianapolis, at the option of the defendant, and by which the defendant agreed to pay said Cade, upon the delivery of such hogs, \$7 for each hundred pounds gross weight, which the hogs should weigh; that Cade had performed all the conditions of said contract on his part, and had, at the city of Indianapolis, and at one of the places named in the contract, on the 14th day of September, 1876, tendered to the defendant two hundred hogs of the kind and quality described in the contract, which hogs he, the defendant, refused to accept and to pay for as he had obligated himself to do. The complaint further charged, "that said Marshall Cade, on the 30th day of November, 1877, by his agreement in writing, which is filed herewith, assigned and transferred to this plaintiff the said within contract made and executed by him and said de-

Gordon v. Carter.

fendant, and all his interest in the same, and all damages arising therefrom." A copy of the contract was filed with the complaint, but no agreement or copy of an agreement in writing, purporting to either assign or transfer the contract to the plaintiff, was filed with it.

The defendant demurred to the complaint:

First. For want of sufficient facts to constitute a cause of action ;

Second. For defect of parties defendants in this, that Marshall Cade should have been made a defendant in the action.

His demurrer was, however, overruled. Issue being joined, the court tried the cause. There was a finding for the plaintiff, assessing his damages at \$581.90, and judgment against the defendant for that sum.

The first question presented here is, Did the court below err in overruling the demurrer to the complaint?

In the argument of that question, the appellant maintains that, upon the facts stated, Cade was a necessary party defendant to the action, and that, for that reason, if for no other, the demurrer ought to have been sustained to the complaint.

Section 6 of the code of 1852, which was in force when this action was commenced, provided, that "When any action is brought by the assignee of a claim arising out of contract, and not assigned by endorsement in writing, the assignor shall be made a defendant, to answer as to the assignment, or his interest in the subject of the action." 2 R. S. 1876, p. 35.

As has been seen, the complaint did not aver that the contract, counted upon in this case, was assigned and transferred to the appellee by an "endorsement in writing." The inference would rather seem to be that the assignment and transfer relied upon was by an instrument in writing separate and distinct from the contract.

Upon the facts, as stated in the complaint, Cade ought to have been made a defendant to the action, and the demurrer, for want of proper parties defendants, should have been sustained. *The Greensburgh, etc., T. P. Co. v. Sidener*, 40 Ind. 424 ;

Cook *et al.* v. Baecher.

Clough v. Thomas, 53 Ind. 24; *Nicholson v. The L., N. A. & C. R. W. Co.*, 55 Ind. 504; *Reed v. Garr*, 59 Ind. 299; *Reed v. Finton*, 63 Ind. 288; *The Marion, etc., G. R. Co. v. Kessinger*, 66 Ind. 549; *Leedy v. Nash*, 67 Ind. 311.

We have not considered whether the complaint was, in other respects, sufficient. Nor need we inquire whether, upon the evidence, a new trial ought to have been granted.

For error in overruling the demurrer to the complaint the judgment will have to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 9124.

COOK ET AL. v. BAECHEER.

MORTGAGE.—*Description.*—The description of real estate in a mortgage, as “all that part of lot number two hundred and thirty-five, described as follows: Fifty-five feet off of the southeast side of lot two hundred and thirty-five, according to the survey by J. and E., of the old Borough of V., bounded in front by M. street, on the northwest by part of the same lot, owned by C. M. A., on the southeast by Sixth street, and in the rear by lot number two hundred and thirty-six, all situate in the city of V., county of,” etc., is a sufficient description.

From the Daviess Circuit Court.

F. W. Viehe and *R. G. Evans*, for appellants.

H. S. Cauthorn and *J. M. Boyle*, for appellee.

ELLIOTT, C. J.—This record presents a single question. That question is, whether the description written in the mortgage upon which the rights of the appellee rest is sufficient. The description is as follows: “All that part of lot number two hundred and thirty-five, described as follows: Fifty-five feet off of the southeast side of lot two hundred and thirty-

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five, according to the survey by Johnson & Emison, of the old Borough of Vincennes, bounded in front by Main street, on the northwest by part of the same lot, owned by C. M. Allen, on the southeast by Sixth street, and in the rear by lot number two hundred and thirty-six, all situate in the city of Vincennes, county of Knox, and State of Indiana." We regard this description as sufficient. It is a familiar rule, that the part of a deed which describes the property conveyed shall be liberally construed in order to make the deed effective. But this description would be good if the rule of construction were strict instead of liberal. It furnishes such information as will readily enable any one of ordinary intelligence to ascertain the premises which the grantor intended to convey. It is not necessary that the description in the deed should itself identify the property, it is sufficient if it furnishes adequate means of identification.

Judgment affirmed.

No. 8258.

SCHEE v. WISEMAN, ADM'R, ET AL.

PLEADING.—Complaint.—Parties.—A complaint that does not show a right of action in favor of all the plaintiffs is insufficient on a demurrer for want of facts.

LEASE.—Trespass.—Personal Property.—Decedents' Estates.—A leasehold estate is personal property, the title to which on the death of the holder passes to his administrator, and not to the widow and heirs, and for a trespass committed thereon, either before or after his death, the administrator alone could sue, and a complaint to recover for the trespass, in which the widow and heirs of the decedent join with the administrator, is insufficient on demurrer for want of facts.

From the Vigo Circuit Court.

S. C. Davis, S. B. Davis and C. F. McNutt, for appellant.

S. B. Gookins and G. C. Duy, for appellees.

79	389
150	314
150	341
79	389
155	578
79	389
162	528

Schee v. Wiseman, Adm'r, et al.

WORDEN, J.—Action by Andrew Wiseman as administrator of the estate of William McQuilkin, deceased, and the widow and heirs at law of the deceased, against James Schee.

Complaint in two paragraphs. Demurrer for want of facts to each paragraph; sustained as to the first and overruled as to the second. Issue; trial by the court; finding and judgment for the plaintiffs.

The second paragraph of the complaint was as follows:

“The plaintiffs, for a further and second paragraph to their complaint, say, that the said defendant, on or about the 13th day of September, 1876, and on divers other days, unlawfully entered into and upon a certain coal mine of the said plaintiffs, administrator, widow and heirs of said William McQuilkin, deceased, in the county of Vigo, described as follows, to wit: ‘All the coal contained in the upper vein or stratum of coal under six acres of land, situated in Vigo county and State of Indiana, described as follows to wit: Commencing at a point twenty-three rods north of the southwest corner of the east half of the northwest quarter of section eight (8), in township twelve (12) north, range nine (9) west, and running thence east to where the coal crops out, and extending north far enough to make six acres, with the west line of said east half of said northwest quarter of said section 8, as the west boundary, and following the “crop-out” of the coal on the east as the east boundary thereof, it being understood that the term “crop-out” as herein used means the points and places where the coal becomes so thin and worthless as to be unfit and unprofitable for mining purposes. And it is further understood the coal crops out under the surface, so that it can not be determined where it does crop out until the coal is mined; therefore the true intent and meaning of this conveyance is, that McQuilkin shall have the right to mine and take out the coal in said vein, commencing at the point first indicated and extending to the east as far as the coal is fit to mine, and go north between the eastern and western boundaries till he has taken out from under six acres, with full rights and privileges

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to take and carry away over and upon said east half of said quarter section, for men and teams, to enable him to prosecute the work of mining and taking out said coal: Provided, nevertheless, that all right to mine and remove said coal, with other incidental rights, shall cease at the expiration of twenty years from the 30th day of September, 1870.'

"And the plaintiffs say that the defendant has mined, taken out and removed large quantities of coal from said mine, amounting, to the best of their knowledge and belief, to upwards of six thousand bushels of coal, of the value of two thousand dollars; and the said defendant is still continuing, day after day, to work said mine and to take out and remove coal therefrom, and is removing other property of the plaintiffs, and in so doing is doing irreparable damage and injury to said coal mine, and to the deposit of coal therein, the same being a leasehold property, and the estate of the said William McQuilkin in his lifetime, and now the property of the plaintiffs as administrator of and as widow and heirs of said William McQuilkin, deceased; and the plaintiffs say the defendant in so doing claims that he is the owner of said mine and property, whereas in truth and in fact, by a judgment and decree of the Vigo Circuit Court, rendered at the February term, 1875, in a certain cause there pending between the said William McQuilkin, in his lifetime, and the said defendant, it was considered, adjudged and decreed, that the said coal and coal mine, by the above description, were the property of the said William McQuilkin, and that he recover possession of the same from the defendant, pursuant to which recovery, by a writ of possession issued from said court upon said judgment to the sheriff of said county, possession of said property and premises was in due form of law delivered to said plaintiff Wiseman, by said sheriff, which judgment is in full force and unreversed.

"And the plaintiffs say that after the recovery of said judgment, and before the issuing of said writ of possession, the plaintiff Wiseman was, by the Vigo Circuit Court, duly ap-

Schee v. Wiseman, Adm'r, *et al.*

pointed administrator of the estate of said William McQuilkin, deceased, and that on the 24th day of November, 1877, the plaintiff, as such administrator, filed his petition in the Vigo Circuit Court in due form, setting forth that the estate of said William McQuilkin was probably insolvent, and therefore said estate was by said court adjudged to be probably insolvent, and was ordered to be settled as insolvent, which order of record remains in full force.

"And the plaintiffs say, that, unless the defendant is restrained by an injunction and restraining order of this honorable court from so doing, the said defendant will continue to mine, take out, remove and carry away the coal from said mine, thereby doing irreparable injury thereto. Wherefore," etc.

We are met at the threshold of this case with the proposition, that, on the facts stated, the right of action was alone in the administrator and not in the widow and heirs of the deceased, and, therefore, that the demurrer to the paragraph should have been sustained.

This position is well taken. The facts stated are, in brief, that McQuilkin had a leasehold estate for twenty years, on which the defendant committed trespass by mining and carrying away the coal.

The leasehold estate was personal property, and upon the death of McQuilkin the title to it passed to his administrator and became assets, and did not go to the widow and heirs. *Smith v. Dodds*, 35 Ind. 452; *McDowell v. Hendrix*, 67 Ind. 513.

The administrator alone could sue for the trespass, whether committed before or after the death of McQuilkin.

No right of action was shown in favor of the widow and heirs of the deceased, as the damages claimed would be assets subject to the payment of debts, or to distribution according to law.

A complaint that does not show a right of action in favor of all the plaintiffs is bad on demurrer for want of sufficient facts. *Berkshire v. Shultz*, 25 Ind. 523; *Davenport v. McCole*, 28 Ind. 495; *Goodnight v. Goar*, 30 Ind. 418; *Debolt v. Car-*

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ter, 31 Ind. 355; *Lipperd v. Edwards*, 39 Ind. 165; *Parker v. Small*, 58 Ind. 349. Several more recent cases are to the same effect.

The demurrer to the paragraph should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

79 393
126 134

No. 9972.

YONOSKI ET AL. v. THE STATE.

CRIMINAL LAW.—*Sunday Law.—Work of Necessity.—Repairs of Railroad.*—

Where it is shown that there is a real necessity for the repairs of a railroad track, and that the necessary work in making such repairs could be done only on Sunday without the delay of trains, such work is a work of necessity within the meaning of the act of February 28th, 1855, for the protection of the Sabbath (2 R. S. 1876, p. 483; section 2000, R. S. 1881), and the conviction of the employes of a railroad company for such work, so done on Sunday, is contrary to law, and can not be sustained.

From the Pulaski Circuit Court.

N. O. Ross and *G. E. Ross*, for appellants.

D. P. Baldwin, Attorney General, *J. B. Peterson* and *W. W. Thornton*, for the State.

Howk, J.—This prosecution was commenced upon affidavit, before a justice of the peace of Pulaski county, on the 21st day of September, 1881. The affidavit charged in substance, that on the 18th day of September, 1881, at said county, the appellants, Frank Yonoski, Abraham Timmins, T. B. Fowler and Pat Purcell, and one Dague Winn, who were all at that time over fourteen years of age, said day being the first day of the week commonly called Sunday, were found unlawfully at common labor and engaged at their usual

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vocations, to wit: They and there working on the track of the Pittsburgh, Cincinnati and St. Louis railroad, such common labor and usual vocation not being then and there work of charity or necessity, and the said appellants and Dague Winn not being then and there persons who conscientiously observed the seventh day of the week as the Sabbath, nor travellers, a family removing, keepers of a toll-gate or toll-bridge, or ferryman acting as such, contrary to the form of the statute, etc.

On the trial of the cause before the justice, the appellants were each found guilty, as charged in the affidavit, and judgment was rendered against each of them for a separate fine and costs; and from this judgment they appealed to the circuit court. There, the State moved the court for leave to file a substituted affidavit, which motion was granted, and, over the objection and exception of the appellants, the State was permitted to file such substituted affidavit. On arraignment thereon and a plea of not guilty, the issues joined were tried by a jury, and a verdict was returned, finding the appellants guilty as charged, and assessing their punishment at a fine in the sum of eight dollars. The appellants' motion for a new trial, and the separate motion of each of them in arrest of judgment, were severally overruled by the court, and to each of these rulings they and each of them excepted. Judgment was then rendered against all the appellants jointly for the fine assessed and the costs of the prosecution.

The appellants have here assigned, as errors, the following decisions of the circuit court:

1. In overruling their motion to dismiss the cause, for the want of a sufficient affidavit;
2. In permitting the State to file a substituted affidavit;
3. In overruling the motion for a new trial; and,
4. In overruling the motion in arrest of judgment.

The important and controlling questions in this case arise under the alleged error of the court in overruling the motion for a new trial. The appellants' counsel concede that the evidence in the record makes out a case against each of the

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appellants for a violation of the law for the protection of the Sabbath, unless the evidence shows that the labor they were engaged in was a work of necessity, within the meaning of that expression, as used in the statute. The appellants were the servants and employes of the Pittsburgh, Cincinnati and St. Louis Railway Company, and the affidavit charged that they were working on the track of said company's railroad. If the work, in which they were engaged, was a work of necessity to the railway company, within the meaning of the statute, then it is clear, we think, it was also a work of necessity on the part of the appellants, as the servants of such company.

There is no conflict in the evidence in regard to the necessity for the work, or to the necessity for doing such work, on the first day of the week commonly called Sunday. The only question in the case is this: Was the work, in which the appellants were engaged, such a work of necessity as fairly comes within the purview and meaning of that expression, as the same is used in the statute for the protection of the Sabbath?

The evidence on the point under consideration consisted of the testimony of those persons who were in charge of the construction, repair and maintenance of the company's line of railway. This evidence is too long to be set out in full, in this opinion; but it showed very clearly, we think, that the work, in which the appellants were engaged, and for which they were prosecuted in this case, was a work of necessity, and that there was a real necessity for the doing of this work on Sunday; that the work in question was the taking up an old switch and putting in a new one, and could not be accomplished in less time than eight hours; that this work could not have been done on any day of the week, except Sunday, without delaying four of the company's trains, and that Sunday was the only day of the week on which the work could be done without delaying such trains; and that the track of the railroad was then in very bad condition, and the railway company was engaged in taking up the old iron rails, and replacing

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them with steel rails, but the change of switches could not be made except on Sunday without the delaying of trains.

We are of the opinion, that the uncontradicted facts of this case clearly show that the work, in which the appellants were engaged and for which they are prosecuted, was a work of necessity, within the meaning of the statute for the protection of the Sabbath. In *Morris v. The State*, 31 Ind. 189, this court cited the case of *Flagg v. The Inhabitants of Millbury*, 4 Cush. 243, and quoted therefrom, with approval, the following language: "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may be deemed necessity within the statute." This view of the meaning of the word "necessity," as used in the Sunday law, has been approved in a number of the later decisions of this court. *Crocket v. The State*, 33 Ind. 416; *Wilkinson v. The State*, 59 Ind. 416; *Edgerton v. The State*, 67 Ind. 588; *Turner v. The State*, 67 Ind. 595.

Doubtless, there was no physical or absolute necessity in the case at bar, requiring the railway company to cause the work, in which the appellants were engaged, to be done on Sunday. But the necessity for doing the work on that day, rather than on some other day of the week, grew out of and was incident to the particular business in which the railway company was engaged; for delays in the running of its trains, and in the transaction of its business, might and probably would injuriously affect not only the company, but also the general public. Therefore, it seems to us, the undisputed facts of this case clearly show, that the work in which the appellants were engaged was a work of necessity, within the meaning of that expression, as used in the statute for the protection of the Sabbath. It follows, that the verdict of the jury was not sustained by sufficient evidence, and was contrary to law; and, for these causes, the appellants' motion for a new trial ought to have been sustained.

Wilkinson v. Moore *et al.*

Some other questions are discussed by counsel, but the conclusion we have reached renders it unnecessary for us to consider or decide them.

The judgment is reversed, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

No. 8434.

WILKINSON v. MOORE ET AL.

JURISDICTION.—*Justice of the Peace.*—The jurisdiction of an inferior tribunal, as that of a justice of the peace, must be shown affirmatively.

SAME.—*Attachment.*—An attachment is an auxiliary procedure, dependent for its validity upon the jurisdiction of the court in the principal case.

SAME.—*Actions on Contract before Justices.*—*Judgment.*—*Collateral Attack.*—An action on contract against a resident of the State, before a justice, unless commenced by *capias*, must be brought in the township of the defendant's residence, if there is a competent justice in such township, and the fact that a writ of attachment has issued, and property has been seized in the township where the suit is brought, does not take the case out of the rule. But if the defendant is served with process, and does not appear to dispute the jurisdiction, the judgment rendered against him or his property can not be questioned collaterally.

From the Montgomery Circuit Court.

E. C. Snyder, for appellant.

A. L. Richards and *H. M. Billings*, for appellees.

WOODS, J.—The appellant sued the appellees for a wrongful seizure and conversion to their own use of a quantity of lumber, the property of the appellant.

The appellees answered to the effect that the defendant Hays being a justice of the peace within and for Wayne township, Montgomery county, Indiana, the defendant Moore, on the 2d day of July, 1879, filed before him, as such justice, a

79	397
136	118
79	397
142	515
79	397
146	159
79	397
149	558

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complaint against the appellant, wherein the appellant was alleged to be indebted to Moore in the sum of \$49; that a summons was issued against the appellant and delivered to a constable of the township, returnable July 5th, 1879, and a return endorsed by the constable that the appellant could not be found in the county; that on the same day, July 2d, 1879, Moore filed with said justice of the peace an affidavit and undertaking for an attachment against the goods and chattels of the appellant; that afterwards, on the same day, a writ of attachment was issued by the justice against the appellant and placed in the hands of said constable; that notice of the issuing of said writ of attachment and of the pendency of said cause was given for more than three weeks prior to the day set for the trial of the cause, by publishing the same in *The Waynetown Banner*, a public weekly newspaper, published in said county; that by virtue of the writ of attachment the constable seized the lumber mentioned in the complaint and caused the same to be regularly appraised by himself and a competent householder of the said township; that afterwards, on the 26th day of July, 1879, at the time and place specified in said notice, said cause was tried by the court, the appellant not appearing, and judgment was duly rendered against said property and the appellant, and an order of the court made for the sale of the lumber by the constable; that a copy of said order was issued to the constable, who, after giving ten days' notice of the time and place of the sale, sold the lumber in all things according to the order of the court; which is the trespass complained of.

Saving an exception to the overruling of his demurrer to this answer, the appellant replied as follows:

That the action mentioned in the answer was not commenced by a *capias ad respondendum*, and was not a suit for trespass to real or personal property, and that at the time of the commencement of the cause before said Richard T. Hays, where judgment by default was rendered against the plaintiff, Hays as such justice of the peace had no jurisdiction of the

person of the plaintiff, for the reason that the plaintiff was not a resident of Wayne township, in Montgomery county, but was a resident of Jackson township, in Fountain county, where there was a justice of the peace competent to act.

The court sustained a demurrer to this reply, and the appellant excepted. Whether the rulings of the court upon these demurrers were right, are the questions to be decided.

The general jurisdiction of justices is limited territorially to the townships for which they were elected and wherein they reside. 2 R. S. 1876, p. 605, section 9. But concerning attachments the provision is as follows:

"Sec. 122. Justices may issue writs of attachment against the personal property of a debtor under the rules prescribed for the prosecution of such writs, when the amount claimed by any one creditor does not exceed one hundred dollars, and their jurisdiction in such case shall be co-extensive with the county."

The rules referred to are those prescribed in the civil code of practice. *Dunn v. Crocker*, 22 Ind. 324; 2 R. S. 1876, p. 98, art. 9, section 156. It is provided in section 156 of the code, that "The plaintiff, at the commencement of an action, or at any time afterwards, may have an attachment against the property of the defendant, in the cases and in the manner hereinafter stated," etc.; and by sections 196 and 197 it is required that "The constable shall return the order of attachment within ten days, with his doings thereon; and in case where a summons has not been served and property has been attached, the justice shall give three weeks' notice of the attachment, in some public newspaper, published in the county, if any is published therein; if not, then by posting up written notice thereof in three of the most public places in the township, and fix the day of trial at the expiration of such notice."

"If the defendant does not appear and give bond for the release of the property attached, before the day of trial, the justice shall proceed to hear and determine the cause, and in case judgment is given against the defendant, he shall order

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the property to be sold to satisfy the judgment, according to the provisions of this article."

It may now be regarded as the well settled law, that the judgment of a justice of the peace, or other inferior tribunal, rendered in a matter of which by law such court had jurisdiction, and wherein it had according to law acquired jurisdiction of the persons concerned, can not be assailed collaterally on account of mere errors or irregularities in the proceedings. *The Board, etc., v. Markle*, 46 Ind. 96 ; *Stoddard v. Johnson*, 75 Ind. 20. And, on the other hand, it is equally well determined, that presumptions will not be indulged in favor of the jurisdiction of courts of limited powers, and their judgments have no force unless it be affirmatively shown that jurisdiction was acquired. *Jolly v. Ghering*, 40 Ind. 139, and cases *supra*. There is sometimes confusion and misapprehension as to what constitutes jurisdiction in the particular case.

In the case of *Michael v. Thomas*, 24 Ind. 72, it was held that the fact that an attachment had issued, and property had been seized, in the township where the suit was brought, did not take the case out of the rule that an action before a justice of the peace against a sole defendant, who is a resident of the State, unless commenced by a *capias*, must be brought in the township of the defendant's residence, if there be a justice competent to act in such township. The question was raised upon a plea in abatement. The defendant, having been served with process, denied the jurisdiction of the court on the ground that he was a resident of another township. In the opinion delivered, on the appeal, after citing section 122 of the justices' act, and section 196 of the code, the court said: "The first of these sections authorizes justices to issue writs of attachment in cases within their jurisdiction, and, for the purposes of the attachment, makes their jurisdiction, territorially, coextensive with their respective counties. The other section also authorizes justices to issue attachments, and prescribes the mode of procedure ; but neither of them relates to the question

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of jurisdiction over the person of the debtor. They do not either enlarge or limit the jurisdiction in that respect."

The statute provides that "The plaintiff, at the commencement of an action, or at any time afterwards, may have an attachment against the property of the defendant," in certain specified cases; and this court has held that, under this statute, "a proceeding in attachment is not an original suit, but is auxiliary, only, to such suit." *Fechheimer v. Hays*, 11 Ind. 478.

An attachment may be issued at the commencement of an action; but to authorize an attachment a suit must be commenced, that is, a complaint must be filed against the defendant, and a summons issued thereon, and the question arises, Where must the suit be commenced? The statute answers the question. If the suit is in the circuit or common pleas court, against a sole defendant, and founded on contract, as in this case, then the action must be commenced in the county in which the defendant "has his usual place of residence," if he has such residence in any county in this State. See 2 G. & H. 58, section 33. And if, as here, the defendant resides in any township in this State, and the suit be brought before a justice, unless commenced by a *capias*, it must be brought in the township of his residence, if there be a justice competent to act in such township. See, also, *Robbins v. Alley*, 38 Ind. 553; *Boorum v. Ray*, 72 Ind. 151.

This construction of the statutory provisions leads irresistibly to the conclusion that the answer under consideration is not good. It fails to show that the principal action was brought in the township of the appellant's residence, or that he was a non-resident of the State. Unless a resident of the township or a non-resident of the State, the filing of the complaint and issue of the summons against him, as alleged, were nullities, did not constitute the commencement of an action, and, therefore, afforded no support for the attachment, which, being a mere auxiliary proceeding, can not stand by itself.

There is no great hardship or inconvenience in the prac-

Cruse et al. v. Cunningham et al.

tical application of this rule. The creditor, it may be presumed, will in most cases know the residence of his debtor; and whether he does or not, before obtaining a writ of attachment he must ascertain and satisfy the justice of the fact, either that the debtor is a resident of the township and suable therein, or that he is a non-resident of the State. In the latter case, the non-residence, itself being a cause for attachment, may be shown in the affidavit upon which the writ issues. If, in any case, the defendant is served with the process and does not appear to dispute the jurisdiction, the validity of the judgment rendered against him or his property can not be questioned collaterally for want of jurisdiction over his person. *Brickley v. Heilbruner*, 7 Ind. 488. But the summons in this case was not served.

Judgment reversed, with costs, and with instructions to sustain the demurrer to the answer.

79	402
132	180
79	402
152	270
79	402
161	548
161	553

No. 8803.

CRUSE ET AL. v. CUNNINGHAM ET AL.

DEFAULT.—*Setting Aside.*—*Excusable Neglect.*—*Discretion of Trial Court.*—*Practice.*—The trial court did not abuse its discretion in setting aside a defendant's default upon his uncontradicted showing, that he had a meritorious defence; that he had been informed that the cause could not be tried at that term because the judge had been counsel for some of the parties; and that when the default was taken he had left the court room in search of his co-defendant, who had conveyed to him by warranty deed the land in controversy, and had employed counsel and promised to defend his title.

WILL.—*Description of Real Estate.*—*Parol Evidence.*—In an action to recover real estate claimed under a devise by the description: "Part of the donation lot number 158, in township number 3 north, of range number 8 west, containing 200 acres," parol evidence was properly admitted to identify the land sued for with the land devised, and to show that the testator died seized of it and of no other part of donation lot No. 158.

Cruse et al. v. Cunningham et al.

SAME.—In such case, the devise was not void for uncertainty of description of the land.

From the Daviess Circuit Court.

J. Baker, for appellants.

W. D. Bynum and *J. W. Burton*, for appellees.

BICKNELL, C. C.—This was an action to recover the possession of the northwest half of donation lot, No. 158, in township three north, of range eight west, in the county of Daviess. There was a judgment by default against the defendant Cunningham, which was set aside by the court. One of the errors assigned in this appeal is the action of the court in that respect. The affidavit, upon which the default was set aside, showed that said defendant lived in Morgan county, eighty miles from the place where the court was held; that the default was taken on the third day of the term; that on that day said Cunningham, in the morning, reached Washington, and was then informed by some of the parties to the action, that it could not be tried that term because the judge of the court had been counsel for some of the parties; that the land in controversy had been conveyed to him by warranty deed by William Helphenstine, his co-defendant, who had promised to defend his title, and had employed counsel to defend it; that when the default was taken affiant had left the court room to go in search of Helphenstine in reference to his defence; that he fully relied on said Helphenstine to attend to said defence, and for that reason, and also because said judge had been counsel for some of the parties, and he had been informed that on that account there would be no trial at that term, was not ready; that he had a meritorious defence to the action, to wit: That he was the owner of the land in controversy. Wherefore he asked that the default be set aside and that he be permitted to plead. There was a counter affidavit, which, however, did not controvert any of the foregoing facts, but merely showed that the default was taken in the regular course of legal proceedings.

The appellant insists that, the default having been regu-

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larly taken, the appellee's affidavit did not show a case of excusable negligence, under section 99 of the code, but that the failure to appear and defend was inexcusable. We think that, under the circumstances stated in the appellee's affidavit, there was some excuse for him, and that the action of the court in setting aside the default and permitting said appellee to plead was a reasonable exercise of discretion, not available as error.

It was admitted on the trial, that Joseph Cruse died seized of the land in controversy, and that the appellants were his only heirs; as such heirs they claimed the land; the appellees claimed the land under the last will of said Joseph Cruse. The land was described in said will as follows: "Part of the donation lot number 158, in township number 3 north, of range number 8 west, containing 200 acres."

The appellants claim that this description is so uncertain that the devise was void. This is the principal question in the case. In the construction of a will the object is to ascertain the testator's intention, and to that end all the provisions of the will relating to the subject under consideration must be consulted. *Lutz v. Lutz*, 2 Blackf. 72; *Kelly v. Stinson*, 8 Blackf. 387; *Jackson v. Hoover*, 26 Ind. 511; *Schori v. Stephens*, 62 Ind. 441. And parol evidence may be resorted to, to prove the testator's intention, by showing the meaning of the language he has used and the subject to which that language refers. *Grimes' Ex'rs v. Harmon*, 35 Ind. 198. Therefore, under a devise "of all my real estate," it may be shown what the testator's real estate was. *Dunning v. Vandusen*, 47 Ind. 423; *Petro v. Cassiday*, 13 Ind. 289. So, where the devise was "of my farm, situated in Lancaster township, and county and State aforesaid." *Lindsey v. Lindsey*, 45 Ind. 552. Or, "the eighty acres whereon the house and barn and most of the improvements are of the home place." *Fraizer v. Hassey*, 43 Ind. 310. Or, "the farm on which we now reside." *Heagy v. Cheesman*, 33 Ind. 96. In such cases the words of the will are not changed; the parol evidence merely identifies the subject. But

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parol evidence is not admissible to alter, detract from or add to the terms of a will. *Bunnell v. Bunnell*, 73 Ind 163; *Fraim v. Millison*, 59 Ind. 123. Nor to correct an alleged mistake of the testator, not apparent on the face of the will. *McAlister v. Butterfield*, 31 Ind. 25. Nor to show that the testator, by giving legacies to certain dead persons, intended that their shares should go to their children. *Judy v. Williams*, 2 Ind. 449. The intention must be gathered from the will itself, and can not be gathered wholly from facts outside of the will. *Judy v. Williams*, 2 Ind. 449. Yet, for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. *Wigram Wills*, p. 51; *Stevenson v. Druley*, 4 Ind. 519; *Jackson v. Hoover*, *supra*. Therefore, where the description in a will was, "my land, being the south half of the northeast quarter of section 36, in township 3 south, of range 12 east," parol evidence was admitted to identify the land intended, by showing that the testator owned no land in the northeast quarter of said section, but did own the south half of the northwest quarter thereof. *Cleveland v. Spilman*, 25 Ind. 95.

In the case at bar, the testator had no heirs except his father and one brother. He bequeathed nearly all his real estate, including the land in controversy, to Charity Lodge No. 30, of Free and Accepted Masons, in Washington, Daviess county, for the purpose of building a Masonic lodge on certain specified lots, with power to sell all the other lots. The parol evidence, which was admitted over appellants' objection, showed that donation lot No. 158, in town three north, of range eight west, was estimated to contain about 400 acres, in

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fact it contained 418 acres, of which ten acres were in the river; but it appeared that one-half of it was called 200 acres, and one-fourth of it 100 acres; and that Joseph Cruse, in his lifetime, was in possession of 200 acres of said donation lot 158, claiming to own it. Some of the witnesses said he claimed 200 acres, or, perhaps, one-half of the donation lot; one witness said Joseph never claimed more than half the lot, and the evidence showed that the half claimed by Joseph, and of which he was in possession, was the same half for the recovery of which this suit is brought, and of which said Joseph died seized, as both parties admitted on the trial. The evidence also showed that the other two quarters of said donation lot were owned by other parties.

Under the authority of the cases hereinbefore cited, the parol evidence was properly admitted, and it showed very clearly that the property devised by Joseph Cruse to Charity Lodge No. 30 was the same half of said donation lot which is sought to be recovered in this suit. The court committed no error in admitting the will in evidence, nor in admitting the parol evidence in explanation of it.

This evidence defeated the appellants' action, by showing that they had no title. It was not necessary that the defendants should show title in themselves. They undertook to do it, and offered in evidence certain deeds which were admitted over the objection of the appellants, but whether these deeds were admissible or not, it is not necessary to determine. The will, and the parol evidence in connection therewith, showed a want of title in the appellants, so that the finding is supported by sufficient evidence, and is not contrary to law. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things affirmed, at the costs of the appellants.

Wright, Adm'r, v. Dean.

No. 8601.

WRIGHT, ADM'R, v. DEAN.

PARENT AND CHILD.—*Minor's Earnings*.—A father may emancipate his minor child from service to him, and thereafter the child has a right to his own earnings, and may recover wages from the father as from a stranger, as if he had arrived at full age.

From the Harrison Circuit Court.

W. T. Jones, L. Jordan and S. J. Wright, for appellant.

G. W. Self, for appellee.

MORRIS, C.—The appellee, by his next friend, brought this suit against the appellant as administrator with the will annexed of Daniel Dean, deceased, to recover for ten months' work and labor, alleged to have been performed for the appellant's testator in his lifetime.

The appellant answered the complaint in four paragraphs. The first was the general denial; the second, payment; the third was withdrawn.

The fourth paragraph of the answer stated, that, during the time mentioned in the complaint, the appellee was a minor, the son of the deceased, Daniel Dean, and living with him as a member of his family during said time, and that the work, labor and services, mentioned in the complaint, were rendered and performed by the appellee for said deceased, as such minor son and as a member of his family, and not otherwise.

The appellee replied to the answer by a general denial. To the fourth paragraph of the answer, he also replied specially, admitting that he was the son of the decedent, Daniel Dean, and that he was a minor at and during the time said services were rendered, but alleging that, before said work and labor were performed, the decedent, his father, had emancipated and set him free, giving him his time, and authorized him to make contracts in his own right and receive for himself, and free from all claims of the decedent as his father, his own earnings and all the fruits of his industry; that, after decedent had

Wright, Adm'r, v. Dean.

so relinquished to him his right to his labor, he agreed to pay the appellee \$14 per month, if he would work for him from the first of February, 1876, until after the crops should be gathered in the ensuing fall; that he worked for his father under this contract, until 6th day of December, 1876, when the latter died; that the labor so performed is the same labor mentioned in the complaint.

To this paragraph of the reply the appellant demurred. The demurrer was overruled. The cause was submitted to the court for trial; finding for the appellee. The appellant moved the court for a new trial, on the ground that the finding is contrary to law and not sustained by sufficient evidence, and because the damages assessed are excessive. The court overruled the motion for a new trial.

The errors assigned are as follows:

1. The court erred in overruling the appellant's demurrer to the second paragraph of the appellee's reply to the fourth paragraph of the answer.

2. In overruling the appellant's motion to suppress parts of the deposition of Temple C. Byrn.

3. In overruling the motion of appellant to suppress the sixth and eighth questions, and the answers thereto in the deposition of Martha E. Byrn.

4. In overruling the appellant's motion for a new trial.

Did the court err in overruling the demurrer to the second paragraph of the appellee's reply to the fourth paragraph of the answer?

The law imposes upon the father the duty of supporting and educating his minor children, and, to enable him properly to discharge this duty, it gives him not only a right to their custody and control, but to their labor and earnings during their minority. While the law gives the father this right, it allows him to relinquish, by agreement, the right to the child to receive its own earnings, to enter into and enforce contracts for its own benefit and on its own account. When the father

Wright, Adm'r, v. Dean.

emancipates and sets free his child, he has no power to reclaim the right to its time or service.

Schouler, in his work on the Domestic Relations, says:

"The minor who is released from his father's service stands, as to his contracts for labor either with strangers or with him, upon the same footing as if he had arrived at full age; and, such being the case, the father may contract to employ and pay the child for his services, and be bound in consequence like any stranger to fulfil his agreement." Pages 371 and 372.

Parsons says: "It is certain that a father may, by an agreement with his minor child, relinquish to the child the right which he would otherwise have to his services, and may authorize those who employ him to pay him his wages, and will then have no right to demand those wages, either from the employer or from the child." 1 Parsons Con., p. 310. *Steel v. Steel*, 12 Pa. St. 64; *Hall v. Hall*, 44 N. H. 293; *Burlingame v. Burlingame*, 7 Cow. 92; *Morse v. Welton*, 6 Conn. 547.

The averments of the reply bring it clearly within the principle of the above authorities. There was no error in overruling said demurrer.

The second and third errors present no question for the decision of this court. The irregularities therein suggested were not presented to the court below as reasons for a new trial. The overruling of the motions to suppress the depositions of the Byrns is not mentioned or referred to in the motion for a new trial. This should have been done in order to give the court below an opportunity to correct the error, if any had been made. *The Jeffersonville, etc., R. R. Co. v. Reiley*, 39 Ind. 568.

The testimony tended strongly to show that Daniel Dean had emancipated the appellee and released him from his service and given him his time; that afterwards the decedent requested the appellee to work for him, agreeing to pay him \$14 per month, and that the appellee worked for the deceased from the 1st of February, 1876, until the 6th of December, 1876, when the father died. There was some opposing testi-

Humphrey v. Fair.

mony. We can not, however, weigh the conflicting testimony for the purpose of deciding upon which side it preponderates. If there is any testimony tending legally to support the finding of the court, we can not disturb it on the ground that it is not supported by sufficient evidence.

It is also insisted that the damages are excessive. The appellant claims that the appellee sold one hundred barrels of apples belonging to the decedent and received and retained the proceeds, amounting to \$65. While the testimony shows that the appellee, while working for the decedent, marketed and sold for him the apples, it fails to show that he retained the proceeds. One witness states that the decedent said he had received nothing for the apples; but when this statement was made, and whether in the presence or absence of the appellee, does not appear. We can not say that the damages were excessive. This disposes of all the questions in the record.

The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the cost of the appellant, to be levied of the assets in his hands as administrator of Daniel Dean.

79 410
135 155

No. 8204.

HUMPHREY v. FAIR.

CONTRACT.—*Statute of Frauds.*—*Parol Agreement.*—Where a debtor conveyed land to his creditor upon the parol agreement that the latter should sell the same, and, after satisfying the debt out of the proceeds, pay the residue to the debtor, and a sale was accordingly made, the agreement to pay can be enforced, and is not within the statute of frauds.

PLEADING.—*Complaint.*—“*Due and Unpaid.*”—That a sum of money is “due and unpaid,” is sufficiently shown by a complaint, if it appear thereby that the event upon which it was to be paid has occurred, and that the defendant is indebted to the plaintiff in that sum.

From the Cass Circuit Court.

Humphrey v. Fair.

M. Winfield and Q. A. Myers, for appellant.

D. B. McConnell, for appellee.

WORDEN, J.—Complaint by the appellee against the appellant, alleging in substance, among other things, that on or about the 21st of March, 1867, the plaintiff, Fair, executed and delivered to the defendant, Humphrey, a mortgage on certain real estate situate in Cass county, Indiana, particularly described, to secure the payment of three promissory notes of \$500 each, executed by the plaintiff to the defendant; that when the first note became due the plaintiff was unable to pay it, and it was then agreed between the plaintiff and the defendant that the plaintiff should convey to the defendant his equity of redemption in the land, to hold and sell for the payment of the debt, and any overplus that might arise from the sale was to be paid to the plaintiff; that the defendant received the conveyance and transfer of the land on that condition and agreement and no other; that the defendant subsequently sold the land to one Samuel McCoy for the sum of \$2,400 and received the purchase-money in full therefor; that the plaintiff, upon learning that the defendant had sold the land for the above named amount, demanded of the defendant payment of the excess after payment of the sum secured by the mortgage and reasonable expenses of making the sale, and that the defendant refused to make such payment. Wherefore the plaintiff said that the defendant was indebted to him in the sum of one thousand dollars, etc.

The defendant demurred to the complaint for want of sufficient facts, but the demurrer was overruled. He then answered as follows:

1. General denial.
2. Payment.
3. Want of consideration.
4. Statute of limitations of six years.
5. Same in substance as fourth.

Issue and cause submitted to a jury for trial. The defend-

Humphrey v. Fair.

ant demurred to the evidence, and the jury was discharged. The court overruled the demurrer to the evidence, assessed the plaintiff's damages at \$461.51, and rendered judgment accordingly.

It is claimed that the court erred in overruling the demurrer to the complaint, the chief objection to which is that the contract therein alleged is within the statute of frauds. This objection, however, can not prevail.

It may be that the defendant could not have been compelled to sell the land at all, the contract not having been in writing, and that until sold the plaintiff could recover nothing. But the defendant sold the land and thus voluntarily complied with the portion of the contract within the statute. His agreement to pay to the plaintiff the overplus which he might receive on sale of the land after paying the mortgage debt was not within the statute at all. The defendant has voluntarily performed that portion of the contract which was within the statute, and he can not claim immunity from the performance of the residue. By the performance of that portion of the contract which was within, he waived the benefit of, the statute. *Tinkler v. Swainie*, 71 Ind. 562, and cases there cited. See, also, *Reyman v. Mosher*, 71 Ind. 596; *Arnold v. Stephenson*, ante, p. 126.

It is also urged that the complaint does not show that the plaintiff complied with his part of the contract by conveying the land to the defendant. It was alleged that the defendant received the conveyance and transfer of the land. This means, as we think, taken in connection with the entire allegations of the complaint, that the defendant received the conveyance from the plaintiff; and, if he did, the plaintiff must have made the conveyance.

It is further urged that the complaint was bad because it did not show that the sum claimed was "due and unpaid." The facts alleged show that the plaintiff's claim became due when the defendant received the purchase-money from McCoy; and that it was unpaid was sufficiently shown by the

Applegate v. White *et al.*

allegation that the defendant was indebted to the plaintiff, etc. *Johnson v. Kilgore*, 39 Ind. 147.

There was no error in overruling the demurrer to the complaint. Nor was there any error in overruling the demurrer to the evidence. The evidence tended, to say the least of it, to establish every fact essential to the plaintiff's recovery.

There is no error in the record.

The judgment below is affirmed, with costs.

No. 8325.

APPLEGATE v. WHITE ET AL.

PRACTICE.—Bill of Exceptions.—When a bill of exceptions is not filed at the time, the record, *dehors* the bill, must show that time was given. It is not sufficient that it be shown only by the bill of exceptions itself.

From the Madison Circuit Court.

W. R. Pierse, D. W. Woods, C. B. Gerard and C. D. Thompson, for appellant.

C. L. Henry, W. S. Diven, J. W. Sansberry and M. A. Chipman, for appellees.

FRANKLIN, C.—Appellant sued Thomas A. White, Mary A. White, Logan A. Lane and Elizabeth J. Line, for the purpose of having a mortgage, executed by White and wife to Lane on certain real estate, declared null and satisfied, alleging that he was then the owner of the mortgaged land; that it had formerly, at the time of the execution of the mortgage, belonged to White's wife; that she was, at the time of the execution of the mortgage, a minor, and that upon her arrival at age she had disaffirmed the mortgage contract. Line, as assignee of Lane, filed a cross complaint, asking for judgment on the note and a foreclosure of the mortgage.

79	413
147	500
79	413
156	636

Issues were formed, trial by jury, verdict for appellee Line, and, over a motion for a new trial, judgment in her favor.

The only error assigned is the overruling of the motion for a new trial, and that is based upon the insufficiency of the evidence to support the verdict.

The record in this case is in a very peculiar condition. It consists of a bill of exceptions, appeal bond, and, under a *certiorari*, a certified copy of the judgment.

The bill of exceptions purports to contain all the pleadings, motions, rulings and record entries in the case, except the judgment and appeal bond.

The conclusion of the bill of exceptions, following a copy of the motion for a new trial, reads as follows: "Which motion the court on the 26th day of August, 1879, the same being the sixty-second judicial day of said term of said court as aforesaid, the court overruled said motion for a new trial of said cause, to which ruling of the court in overruling said motion for a new trial, said Andrew J. Applegate excepted at the time, and the court then, on said 26th day of August, 1879, ordered that said plaintiff, Andrew J. Applegate, should have sixty days from said day in which to make and file this, his bill of exceptions, and said Andrew J. Applegate prayed an appeal of this cause to the Supreme Court of the State of Indiana, which the court then and there granted on his filing a bond in this court, payable to Elizabeth J. Line, in the sum of \$900, with surety to the acceptance and approval of the clerk of this court. And this bill of exceptions is completed within the time given by this court, and within such time is by me signed and filed with the clerk of this court, and this bill of exceptions is by me signed and made a part of the record as prayed for by the plaintiff, Andrew J. Applegate. Hervey Cravens, Judge. Filed October 17th, 1879. Jesse L. Henry, Clerk." And on the same day, being the tenth judicial day of the October term, 1879, an appeal bond was filed.

No part of the foregoing quotation from the conclusion of the bill of exceptions purports to be a copy of any of the

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record entries in the case, but purports to give a history, from the recollection of the court, of what had nearly two months before, at a former term, been done in the case. There is no copy of any record entry contained in the bill of exceptions showing that time was given in which to file the bill of exceptions. And there being no transcript filed, other than the bill of exceptions, the appeal bond and certified copy of the judgment, and the clerk having certified "the foregoing, together with the record certified to the Supreme Court in answer to the *certiorari* issued herein, to be full, true and complete copies of all the papers, entries and proceedings had in said cause, as the same now appear from the reinstatement of record of the same in my office," etc, we, therefore, must come to the conclusion that there was no record entry of time having been given in which to file the bill of exceptions.

Where exceptions are taken and not reduced to writing and filed at the time of the exception, and time is given to afterwards reduce them to writing and file them, the record entries, *dehors* the bill of exceptions proper, must show that time was given by the court, and that the bill of exceptions was filed within such time. Where the record entries do not show that such time was given, a statement in the bill of exceptions that time was given is not sufficient. See 2 R. S. 1876, p. 176, sec. 343; *Nye v. Lewis*, 65 Ind. 326; *Robinson v. Johnson*, 61 Ind. 535; *Greenup v. Crooks*, 50 Ind. 410; *Rinehart v. Bowen*, 44 Ind. 353; *Goodwin v. Smith*, 72 Ind. 113; *The Singer, etc., Co. v. Struckman*, 72 Ind. 601.

The case of *Nye v. Lewis*, *supra*, is precisely in point. The following is the conclusion of the bill of exceptions in that case: "And the court having considered said affidavits and motion (for a new trial), overruled said motion, to which ruling the plaintiff then and there excepted, and 120 days were given to file his bill of exceptions. And now, within said time, plaintiff files this his bill of exceptions, which is examined and approved by the court, as full, true and correct, and is now signed and made a part of the record." Dated and signed by the judge.

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Upon which the court said: "This 'special leave' must be shown by the record of the court to have been granted, and where it is not so shown it will not be presumed, in any case, to have been granted, but the contrary. And, where the record fails to show the grant of such special leave, the judge has no jurisdiction or power to sign a bill after the expiration of the term. This right to file a bill of exceptions, after the term has expired, is purely statutory, and must be exercised within and according to the statute. * * * It is manifest to our minds that the Legislature never contemplated that the court or judge should assume to insert in the bill of exceptions, where it is signed after the term, that leave was given at the term to file the same after the term; because the statute does not require that the party preparing the bill of exceptions shall submit it, before it is signed by the judge, to the opposite party. *Robinson v. Johnson*, 61 Ind. 535. * It would open the door to enormous abuse, therefore, if the judge should be allowed to insert in bills of exceptions statements that are not legitimate and proper parts of such bills, and thereby bind parties by such arbitrary and extra-judicial statements." The same ruling was made in the case of *Schoonover v. Reed*, 65 Ind. 313.

As this question appears to have been thoroughly settled by our statute and the former decisions of this court, and in the right way, we feel constrained to hold that the objection to the bill of exceptions being properly in the record is well taken; and that the bill of exceptions is not in the record as a proper part thereof. In the absence of a bill of exceptions we are unable to say the court erred in its ruling upon the motion for a new trial.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is, in all things affirmed, with costs.

Morrison *et al.* v. Collier.

No. 8511.

MORRISON ET AL. v. COLLIER.

79	417
164	347

79	417
169	551

PLEADING.—*Complaint Cured by Verdict.*—A cause of action, though defectively stated, if not tested by demurrer, will be upheld after verdict.

MISTAKE.—*Description of Land in Deed.*—*Pleading.*—*Vendor and Purchaser.*—

In an action between vendee and vendor to correct a mistake in the description of land, it is enough to show that the parties agreed about and intended the deed to describe a specific piece of property, and that, by their mutual mistake and the mistake of the scrivener, it was not properly described. It is not necessary that the parties shall have agreed upon the particular words to be used, and that by mistake other words were used instead.

SAME.—*Deed.*—*Correction.*—*Judgment Lien.*—*Execution.*—*Negligence.*—*Good-Faith Purchaser.*—

As between the immediate parties to a deed, a description will be corrected, though the mistake arose from negligence, and one who obtains a judgment lien and an execution against the property is not a purchaser for value, whose rights will be preferred to a vendee who before the date of the judgment had paid the price and received a deed intended, but which by mistake failed, to convey the property. The rule that equity will not aid the negligent does not apply in its fullest sense to the correction of mistakes merely in description of the property contracted about.

SAME.—*Statute of Frauds.*—*Personal Privilege.*—The correction of mistakes of description in a deed of land is not forbidden by the statute of frauds; and, if it were, the right to plead the statute is personal, and does not belong to a stranger.

PRACTICE.—*Instructions.*—*Entry by Clerk.*—Instructions can not be made a part of the record by recitals of the clerk entered upon the transcript.

From the Hancock Circuit Court.

J. A. New and *C. E. Barrett*, for appellants.

C. G. Offutt, *R. A. Black* and *W. P. Bidgood*, for appellee.

WOODS, J.—Jane Collier, the appellee, brought this action against the appellant Morrison, and three others, to correct an alleged mistake in the description of land conveyed, or intended to be conveyed, to her by the defendants John R. and Ruth J. Collier, and to enjoin the sale of the land by the sheriff upon an execution in favor of Morrison against John R. Collier. Issues of fact were formed and a jury trial had,

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resulting in a verdict for the plaintiff. The court overruled a motion in arrest and gave judgment upon the verdict. The other defendants having refused to join in the appeal, Morrison has assigned as error the overruling of his motion in arrest, and that the complaint does not state facts sufficient to constitute a cause of action against him.

It is well settled that a complaint which shows a cause of action, though defectively stated, will be upheld after verdict in favor of the plaintiff, if not tested by demurrer. *Trammel v. Chipman*, 74 Ind. 474; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110; *Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294.

The principal objection made to the complaint is, that it does not show such a mistake as to entitle the plaintiff to relief; that there is no averment that the scrivener did not embody in the deed just what the parties intended, and that the mistake alleged is a mistake of law and not of fact.

The averments in this respect are as follows: That on the 31st day of August, 1878, the defendant John R. Collier was the owner in fee simple and in possession of the following-described real estate, in Hancock county, Indiana, to wit: A middle division of the west half of the southeast quarter of section eleven (11), etc., particularly described as follows (and here is given a description by metes and bounds), and on a day named entered into a contract with the plaintiff whereby he agreed to convey to her the said tract of land in consideration of \$1,000, and on the 31st day of August, 1878, made to her a deed with covenants of general warranty, in which his co-defendant and wife joined, thereby intending to convey the real estate aforesaid pursuant to the terms of their contract, but that by the mutual oversight, inadvertence and mistake of the plaintiff and the said John R. and Ruth J. Collier, as also of the scrivener employed by them to draft the deed, the land was mistakenly and erroneously described as follows, to wit: The southeast division of the west half of the southeast quarter of section eleven (11), etc., the words "the southeast

division" being mistakenly and erroneously inserted instead of the words "a middle division," which were omitted, as were also the words and figures more particularly bounding and describing the same as hereinbefore contained, which omitted words and figures are a necessary and material part of the description.

The complaint is not subject, in our judgment, to the objections made. It shows a contract between the parties for the conveyance of a specific property, which is described in general terms and by definite metes and bounds. As to the general description, it is alleged that by the mutual mistake of the parties, as well as by the mistake of the scrivener, specified words were omitted and other words of a quite different sense inserted, and that the particular description, by the same mistake, was omitted entirely. This is the statement of a mistake of fact, and not merely of a mistaken legal conclusion, and would seemingly have been good on demurrer. It is certainly sufficient after verdict. It is further insisted that the mistake must have been of such a nature that the party seeking relief could not by reasonable diligence have got knowledge of it when put on inquiry; and to this point are cited, *Story Eq. Juris.*, sec. 146, and *First Nat. Bank, etc., v. Gough*, 61 Ind. 147.

It may be observed that in the case last cited the court expressly passes by, without deciding, whether upon the facts stated the court would have supplied the omission in the mortgage as between the original parties. The mortgage had been given to secure a pre-existing indebtedness; third parties had acquired judgment liens, which were, therefore, just as meritorious and as much entitled to be preserved as was the claim of the alleged mortgagee, and, this being so, it was held that the negligence of the plaintiff was such as to forbid the granting of equitable relief.

The plaintiff in this case, however, was a purchaser for a price which, though not expressly averred to have been paid, after verdict will be presumed to have been paid. The appellant had acquired a judgment, and indeed had caused his

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execution to be issued and levied upon the land, but this did not make him a good-faith purchaser for value, or give him an equity equal to that of a purchaser, who had received a conveyance, though with a misdescription of the property, and presumably had paid the purchase price and taken possession.

The passage from Story, which is referred to, was not written in reference to the correction of mistakes in written instruments, as is shown by the illustration which immediately follows in the same section, namely: "Thus, if a party has lost his cause at law from the want of proof of a fact, which by ordinary diligence he could have obtained, he is not relievable in equity; for the general rule is, that if the party becomes remediless at law by his own negligence, equity will not relieve him." Thus applied, the doctrine is indubitably sound and rests upon considerations of public policy as well as of private right. There would be no end to litigation if a party might neglect his suit at law in the expectation that, upon a future discovery of something to his advantage, he could resort to equity for relief.

In some sense, the same rule may doubtless apply and does apply to the correction of mistakes in the terms of deeds and other written instruments. A party may not carelessly sign a contract and then obtain its reformation in respect to its terms and conditions; but to say that in respect to the mere description of the subject-matter of the contract, the property intended to be conveyed, mortgaged or contracted about in any way, there can be no relief unless particular words of description had been agreed upon and others used by mistake in their stead, and unless the mistake was of such a nature that the party could not by reasonable diligence obtain knowledge of it, when put upon inquiry, would, in many, if not in most, instances, be to deny relief entirely. The act of making or accepting a deed or contract puts the party upon instant inquiry; and so the making of a mistake becomes necessarily, as, indeed, in most cases doubtless it is in fact, an act of negligence, a failure to exercise reasonable care; so that, under the rule

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contended for, the fact which ordinarily makes relief necessary makes it impossible.

There can be no good reason, as it seems to us, for refusing to correct mutual mistakes in matters of description on account of the negligence which caused the mistake, so long as equal or superior rights of third parties have not intervened. Upon the face of the complaint in this case, it does not appear that any such equity had arisen, and therefore, after verdict at least, the complaint is sufficient in this regard.

It is next insisted that the statute of frauds applies; that the contract for the conveyance was not in writing; that the deed as made does not describe the land sought to be embraced in the corrected description; and that, consequently, the granting of the relief prayed would be to enforce, in disregard of the statute, a parol contract for the sale of real estate. The statute, however, does not apply to the correction of mistakes in description, and, if it did, the appellant could not interpose it. The parol contract is not void, and whether it shall stand depends on the choice of the parties. It is the personal privilege of a party, his privies or representatives, to abide by or repudiate his contract within the statute, and a mere stranger may not interfere to prevent the performance.

It is upon the distinction between matter of description and the substance of a contract or deed, that it has been held that as to the description of the property the deed of a married woman may be corrected, though it has not been, and probably would not be, held that in any other respects the courts could enforce a correction of her contracts concerning real estate.

Error is claimed in the refusal of the court to give certain instructions, but the question is not properly presented. In the transcript is the following, inserted in a parenthesis: "The court on its own motion gave to the jury the following instructions, which were filed with the other instructions in this cause, but not made a part of the record by bill of exceptions or order of the court, but copied into the record by request of attorneys for defendant Morrison.—Clerk;" and immedi-

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ately following the instructions, which are here set out, is the further parenthetical statement by the clerk: "And these are all the instructions given in the cause.—Clerk." Then follow the instructions which were refused.

It is not competent for the clerk to supply the want of a bill of exceptions by statements such as these. We can not, therefore, say, upon this record, what instructions were given by the court, nor that there was error in refusing those asked by the appellants. Besides the evidence is not in the record. Judgment affirmed, with costs.

No. 8886.

KNOWLTON v. MENDENHALL.

PRACTICE.—*Weight of Evidence.*—*Supreme Court.*—Where the evidence in the record tends to sustain the finding of the trial court on every material point, the Supreme Court will not reverse the judgment on the mere weight of the evidence.

From the White Circuit Court.

R. P. Davidson and — *Hays*, for appellant.

Howk, J.—This suit was commenced by the appellant against the appellee, before a justice of the peace of White county. In her verified complaint, the appellant alleged in substance, that she was the owner, and entitled to the possession, of one cow and one yearling heifer, of the value of fifty-five dollars, of which the appellee had possession without right, and which he unlawfully detained from her; and that the cow and heifer had not been taken by virtue of any execution or other writ against the appellant. Wherefore, etc.

The trial of the cause before the justice resulted in a verdict and judgment in favor of the appellant; and the appellee appealed therefrom to the circuit court. There, the cause was tried by the court, and a finding was made for the appellee;

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and over the appellant's motion for a new trial, and her exception saved, the court rendered judgment for the appellee upon and in accordance with its finding.

The only error assigned by the appellant is the decision of the circuit court, in overruling her motion for a new trial; and the only causes assigned for such new trial were that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law.

The evidence is in the record by a proper bill of exceptions, and it seems to fairly sustain the finding of the court. The burthen of the issue was on the appellant, and it was necessary that she should show, by a fair preponderance of the evidence, that, at the time of the commencement of this suit, she was the owner, and entitled to the possession, of the cow and heifer described in her complaint. This, we think, she failed to do. Indeed, it seems to us, that the appellant's testimony, as a witness in her own behalf, tended to show that the cow and heifer, prior to the sale thereof to the appellee, were the property of her husband, John Knowlton. On the trial of the cause, the appellant admitted that the sale of the cow and heifer was made by the treasurer of White county to the appellee, for taxes assessed against John Knowlton, her husband, which had been duly assessed against him and continued delinquent for four or five years, and said sale was regularly made, in due form of law, to satisfy said delinquent taxes, and the appellee bought the property in good faith; and that, if John Knowlton was the owner of the property, then the appellee had a right to recover in this action.

It must be said, therefore, that there is evidence in the record tending to sustain the finding of the trial court; and in such a case this court will not disturb the finding on the weight of the evidence. *Rudolph v. Lane*, 57 Ind. 115; *Swales v. Southard*, 64 Ind. 557; *The Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73.

We find no error in the record.

The judgment is affirmed, at the appellant's costs.

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No. 8802.

SEARLE v. WHIPPERMAN ET AL.

PRACTICE.—Judgment.—Default.—Appeal.—Review of Judgment.—An appeal may be taken, or a bill to review will lie, from a judgment taken by default without first making a motion to set aside the default.

SAME.—Motion to Set Aside Default.—No question that depends upon a motion to set aside a default or to modify the judgment will arise upon an appeal, or upon a bill to review, unless such motion was made. The bill itself will not subserve such purpose.

MORTGAGE.—Complaint.—Foreclosure.—Judgment.—A complaint to foreclose a mortgage and to recover a personal judgment is sufficient, if the facts averred authorize the foreclosure, though they do not authorize a personal judgment.

SAME.—Assignment of Error.—Practice.—Personal Judgment.—Review of Judgment.—When a personal judgment is rendered upon such complaint, an assignment of error, that the complaint does not state facts, etc., either upon appeal or upon a bill to review, presents no question as to the judgment. If the complaint is sufficient for any purpose, it is sufficient to withstand such assignment, and the remedy for such error is by motion to modify or correct the judgment. *Berkshire v. Young*, 45 Ind. 461; *Davidson v. King*, 49 Ind. 338; *Emmett v. Yandes*, 60 Ind. 548, modified.

PLEADING.—The character of a pleading must be determined by its averments and not by the name given it.

SAME.—Parties.—Vendee of Mortgagor.—In an action to foreclose a mortgage, the vendee of the mortgagor is a proper and necessary party, if he accepts the conveyance, though he does not take possession of the property.

From the Cass Superior Court.

S. T. McConnell and *T. J. Tuley*, for appellant.

J. M. Justice, for appellees.

BEST, C.—One William W. Haney brought an action to foreclose a mortgage against Nathan Ridenger and others, to which proceeding he made the appellee Whipperman a party as the holder of a subsequent mortgage, and the appellant a party as the owner of the equity of redemption. Thereupon the appellee Whipperman filed a cross complaint to foreclose a mortgage upon the same premises made by Ridenger against him and others and against the appellant as the owner of the property, and to recover a personal judgment against him upon

79	494
127	75

79	424
133	508

79	434
139	78

79	424
140	413
143	393
143	670

79	424
146	584

79	424
153	494

Searle v. Whipperman et al.

his assumption of the debt. Process was served, and subsequently, upon default, judgment of foreclosure and a personal judgment over, without relief, etc., were rendered against him. The appellant afterward brought this action to review that judgment. The appellee Whipperman demurred to the complaint for want of facts, and the court sustained the demurrer. This ruling is assigned as error, and presents the only question in the record.

The ground upon which the appellant sought to review the judgment was, that the complaint of Whipperman did not state facts sufficient to authorize a personal judgment against him. The complaint was as follows:

"Comes now Henry Whipperman, one of the above named defendants, and, for answer by way of cross bill, says that on the 9th day of October, 1866, Nathan Ridenger, one of the defendants, by his promissory note, a copy of which is herewith filed, marked Exhibit 'A,' and made a part of this complaint, promised to pay one Nancy Butt five hundred dollars (\$500); that said Nancy Butt assigned said note to said Henry Whipperman; that there is now due on said note and wholly unpaid the sum of seven hundred dollars; that a certain mortgage was given by said Ridenger to secure said note, a copy of which is herewith filed, marked 'Exhibit B,' and made a part of this complaint. The defendant further avers in his cross bill, that said Ridenger and wife sold the property described in the mortgage, above referred to, to Frank Searle, one of the above named defendants; that, in said sale to said Searle, said Searle expressly agreed with said Ridenger and wife in said sale and transfer to said Searle, that he, said Searle, would personally stand responsible to said Whipperman, and would pay said Whipperman said sum of five hundred dollars, a copy of which agreement and deed is herewith filed, marked 'Exhibit C,' and made a part of this cross bill and complaint. This defendant further avers that said Nancy Butt was at the time of signing the note to this plaintiff, and has been ever since, wholly insolvent. Wherefore," etc.

Searle v. Whipperman *et al.*

The judgment, as before stated, was taken by default, and the sufficiency of this complaint was not tested by demurrer, nor was there a motion to modify the judgment or to set aside the default.

An appeal may be taken from a judgment rendered by default without first making a motion to set aside the default. *Cochnowar v. Cochnowar*, 27 Ind. 253; *Monroe v. Strader*, 33 Ind. 111.

As a bill to review a judgment for error apparent of record is in the nature of an appeal, such bill will lie without a motion to set aside the default. Each is a proceeding to review a judgment, and any question that arises upon an appeal may be reached by a bill to review, and any question that does not arise upon an appeal can not be reached by proceedings to review. In this respect they are precisely alike. In neither can any question arise that depends upon a motion to set aside a default or to modify the judgment, unless such motions were made. In this case no motion was made, either to set aside the default or to modify the judgment. Nor was the complaint tested by a demurrer. The omission to do so, however, did not waive the objection that the court had no jurisdiction of the subject-matter of the action, or that the complaint did not state facts sufficient to constitute a cause of action. 2 R. S. 1876, p. 59, sec. 54.

All other objections were waived, and, as there is no question as to the jurisdiction, the only question the appellant can raise is whether the complaint of Whipperman stated facts sufficient to constitute a cause of action. This he could raise upon an appeal to this court by an assignment of error, and he can do the same thing by a bill to review in the lower court. By either mode, however, the same question is presented, and that is whether the complaint states facts sufficient to constitute a cause of action. If it does, the judgment for such cause can not be reversed upon an appeal to this court, nor upon proceedings to review. Does the complaint state facts? It avers, in substance, the execution of the mortgage, the maturity and

Searle v. Whipperman et al.

non-payment of the note, the sale and conveyance of the property embraced in the mortgage to appellant, who promised to pay the mortgage debt. These facts constituted a good cause of action against appellant for a foreclosure of the mortgage. *Martin v. Noble*, 29 Ind. 216; *Bowen v. Wood*, 35 Ind. 268; *Bayless v. Glenn*, 72 Ind. 5.

The complaint was good as against a demurrer for want of facts, and of course is good as against an assignment of error for such reason, whether made upon an appeal or by a complaint to review. Indeed, the objection urged against the complaint could not have been reached by a demurrer for want of facts, and we think it may be safely asserted that no objection can be raised by such an assignment of error, either upon appeal or upon a bill to review, that could not have been raised by a demurrer. The fact, that the objection could not have been reached by demurrer, shows very clearly that some other remedy should have been adopted. In fact, the real objection is not that the complaint does not state facts sufficient to constitute a cause of action, but that an unauthorized judgment followed a complaint sufficient to entitle the appellee to some other relief. How shall this wrong be remedied? Not by an assignment of error upon appeal or by bill to review, that the complaint does not state facts, as this question is not determined by the judgment that follows, but by the facts averred. If they entitle the party to any relief, the complaint does state facts, and the objection can not be sustained. The remedy is by motion in the court below to modify or correct the judgment. In *Barnes v. Wright*, 39 Ind. 293, a judgment by default was rendered for a greater sum than was authorized by the complaint, and upon appeal this court said: "Where the defendant has been brought into court, and has suffered a judgment to be rendered against him by default, he can not appeal to this court for the correction of any supposed error in the judgment, without having first applied to the court below for the correction." The same was decided in *Barnes v. Bell*, 39 Ind. 328, and in a number of other cases.

Searle v. Whipperman et al.

Had the appellant appealed directly to this court he could not have obtained a correction of the judgment without having first applied to the lower court for its correction, and, as a bill of review is in the nature of an appeal, it must follow that he can not accomplish by one mode that which he could not accomplish by the other. *The Indiana, etc., Fire Ins. Co. v. Roulledge*, 7 Ind. 25; *Hardy v. Chipman*, 54 Ind. 591. A party may adopt either remedy, but can not pursue both. *Dunkle v. Elston*, 71 Ind. 585. The adoption of one is a waiver of the other. This is because a party may accomplish by one precisely what he can by the other—nothing more and nothing less. As the appellant could not, in the absence of a motion to correct the judgment, correct it upon appeal, he can not, in the absence of such motion, do it upon a bill to review. In *Richardson v. Hawk*, 45 Ind. 451, this court said: "We think it may be stated that a bill of review for error of law appearing in the proceedings and judgment can not be sustained unless the errors are such that this court would reverse the judgment on appeal."

We have shown that the alleged error would not reverse the judgment upon appeal, as the record is presented, and, therefore, can not upon a bill to review. The latter can not be regarded as a motion to correct the judgment, as the court sits as a court of error, and the proceeding to review can not be used as a means of creating an exception in the first instance. *Richardson v. Hawk*, 45 Ind. 451. If the error is not apparent of record before the bill is filed, the bill itself can not create it.

We are aware that this conclusion does not seem in entire harmony with the cases of *Berkshire v. Young*, 45 Ind. 461, *Davidson v. King*, 49 Ind. 338, and *Emmett v. Yandes*, 60 Ind. 548.

In neither of the above cases was the point here decided discussed. The cases of *Berkshire v. Young* and *Emmett v. Yandes* were actions to review judgments because the complaints in foreclosure proceedings were not sufficient to au-

Searle v. Whipperman et al.

thorize a personal judgment. In this respect they were precisely like this case. In the former case it was held that the objection that the complaint did not state facts was not waived, and that such objection might be urged upon a bill to review. The court, without adverting to the fact that the complaint was brought to foreclose a mortgage, considered it simply as a complaint for a personal judgment, and held that it was insufficient. Assuming that such complaint was sufficient to entitle the party to a foreclosure, but not to a personal judgment, it seems clear to us that a demurrer to the complaint for want of facts would be unavailing, and if the party sought to avoid such judgment he must adopt some other remedy. *Jordan v. D'Heur*, 71 Ind. 199. It is equally clear to us, that, if a demurrer for want of facts would in such case be unavailing, an assignment that the complaint does not state facts either upon an appeal or upon a bill to review would be alike unavailing. *Teal v. Spangler*, 72 Ind. 380.

A complaint upon demurrer, or upon an assignment of error that it does not state facts, can not be considered good for one purpose and bad for another. It is either good or bad. If good for any purpose it is not bad. In the case of *Emmett v. Yandes*, the same view was taken, but in neither of them was the question here decided discussed or passed upon. We think these cases should be modified so as to conform to the views here expressed.

The appellant also insists that the complaint does not entitle the appellee to any relief as it is only an answer to the complaint of Haney "by way of cross bill." This objection, we think, is not well taken. The pleading commences, "for answer by way of cross bill." But the character of a pleading must be determined by its averments and not by the name given it. The facts averred did not constitute an answer to the complaint of Haney, but a complaint against the appellant. *Campbell v. Routt*, 42 Ind. 410.

It is also insisted that it does not appear from the complaint, that appellant ever accepted the deed of Ridenger or

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took possession of the property. It was not necessary for him to take possession of the property. If he accepted the conveyance, he was a proper and necessary party to the foreclosure proceeding. While the complaint is subject to some criticism, we think, fairly construed, it avers that Ridenger conveyed the property to appellant, and that this fact was sufficiently averred.

Having reached the conclusion that the complaint was sufficient at least to entitle the appellee to a foreclosure of his mortgage, and, as the alleged error in the rendition of the judgment in such case can not be reached by an assignment of error that the complaint does not state facts, whether made upon appeal or by bill to review, it becomes unnecessary to notice the various reasons urged why the complaint was not sufficient to authorize a personal judgment. For these reasons we think the demurrer was properly sustained to the complaint for review, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the appellant's costs.

79	430
127	942
79	430
143	677
79	430
144	664
79	430
168	286

 No. 6294.

MC COLE ET AL. v. LOEHR ET AL.

FRAUDULENT CONVEYANCE.—Complaint.—A complaint to set aside a conveyance, on the ground that it was made to defraud creditors, which does not show that the grantor, when the conveyance was made and when the suit was brought, had not other property subject to execution, out of which his debts might have been satisfied, is bad on demurrer.

SAME.—Husband and Wife.—Notice.—When the grantee pays nothing, though she be the grantor's wife, it is immaterial whether she had notice of his fraudulent intent or not.

PRACTICE.—Costs.—Supreme Court.—Where the appellant was plaintiff below, and upon a cross error it is held that the court below erred in overruling a demurrer to his complaint for want of sufficient facts, the Supreme Court will reverse and remand the cause at his costs, unless it

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appears that the complaint can not be made good by amendment. NIBLACK, J., dissenting.

INSTRUCTION.—*Jury*.—A jury can not select from contradictory instructions those which correctly express the law.

From the Hamilton Circuit Court.

D. Moss, T. J. Kane and T. P. Davis, for appellants.

M. A. Chipman and H. C. Ryan, for appellees.

ELLIOTT, C. J.—The complaint of the appellees charges that a deed and mortgage executed by Jacob C. Loehr, in his lifetime, were made with the intent to cheat and defraud his creditors, and asks to have them set aside and the property subjected to sale for the payment of his debt. The complaint is bad. A material allegation is lacking. It is not alleged, that at the time the conveyances were made the grantor did not have other property subject to execution, out of which the claims of creditors could have been satisfied. It is well settled, that a complaint to set aside a conveyance as fraudulent must affirmatively show that the debtor did not have other property subject to execution at the time the conveyance was made. *Spaulding v. Blythe*, 73 Ind. 93; *Noble v. Hines*, 72 Ind. 12; *Pfeifer v. Snyder*, 72 Ind. 78; *Hardy v. Mitchell*, 67 Ind. 485. It is also necessary to aver that the debtor did not have property other than that conveyed at the time the suit to set aside the conveyance was instituted. *Bruker v. Kelsey*, 72 Ind. 51; *Sherman v. Hogland*, 73 Ind. 472. Where property remains in the hands of the debtor, which can be reached by process of law, there is no reason for setting aside conveyances made by him. Before resorting to such a proceeding, property in the hands of the debtor should be first exhausted.

The allegation, that the debtor was in embarrassed and failing circumstances, is not equivalent to an averment that he did not possess property other than that conveyed, out of which the claims of creditors could have been made. It may be true that the debtor was financially embarrassed, and yet be the owner of property out of which the claims of creditors could have been satisfied.

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The allegation, that the grantor died notoriously insolvent, does not make the complaint sufficient. The character of a transaction is to be determined by the circumstances surrounding the parties at the time it took place. The validity of a conveyance does not depend upon subsequent events. The question in such cases is the financial condition of the grantor at the time, for, if then solvent, his subsequent insolvency will not invalidate the conveyance. *Sherman v. Hogland*, 54 Ind. 578; *Whitesel v. Hiney*, 62 Ind. 168.

The appellees' cross error is well assigned. The court erred in overruling the demurrer to the complaint.

The tenth instruction given by the court reads thus: "But even if you believe that said Jacob B. Loehr intended to defraud his creditors at the time of making said conveyance, still you should not find for the plaintiffs unless the defendant Julia C. Loehr had a knowledge of such fraudulent intent on the part of her husband, whether she paid any valuable consideration for such property or not." This instruction is radically wrong. Where the conveyance is purely voluntary, and the grantor has not other property out of which the claims of creditors can be satisfied, it may be set aside as fraudulent against those to whom the grantor is at the time indebted. A man can not make gifts of his property, and thus take it from his creditors. *Spaulding v. Blythe*, *supra*; *Sherman v. Hogland*, 73 Ind. 472; *Wynne v. Cornelison*, 52 Ind. 312; *McCormick v. Hyatt*, 33 Ind. 546.

It is insisted that other instructions were given, which cured the error contained in that under immediate mention. Contradictory instructions were given, and it was impossible for the jury to ascertain what rule of law the court intended to lay down for their guidance. It is not for the jury to select from contradictory instructions those which correctly express the law. It is the duty of the court to state the rules of law without confusion or contradiction. Where an erroneous instruction is clearly and fully withdrawn, no harm results, but where it is simply contradicted by another instruction, it is otherwise.

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The judgment must be reversed. A reversal, however, will not authorize a judgment upon the appellants complaint. No cause of action is stated. Until an amendment has been made, there is no complaint upon which a judgment can be supported. The fundamental error in this case was that committed in overruling the demurrer to the complaint. It is just, therefore, that the appellants should pay all costs back to the first error, as well those of this appeal as those in the trial court. As there was no cause of action stated, the appellants were not entitled to any relief whatever. Another and different complaint is required, or their action must fail. It is not just to tax the appellees with any costs in a case where there never was any cause of action alleged against them, and as much as the appellants can reasonably ask is to be allowed the privilege of amending their complaint at the expense of the costs in the trial and appellate courts. If we should adopt the rule that where the appellant's complaint is found to be bad, the judgment will be affirmed without allowing him an opportunity to amend, we should be doing that which in many cases might result in a denial of justice. A complaint lacking such allegations as demand, notice, that the claim is unpaid, or the like, is in many cases bad on demurrer, and yet these defects are remediable by amendment. To deny an opportunity to amend would, in many cases, be to sacrifice substantial rights. We think that the better practice in such cases is to adjudge costs against the appellant and allow him an opportunity to make good, if he can, his complaint by amendment. If he has a cause of action, he ought to be allowed to enforce it. If he is driven to a new action, the statute of limitations might often defeat him. No substantial injury is done the appellee by this rule. If he is really in the wrong, he can not justly complain, because the appellant is given an opportunity to vindicate his rights. As the costs go against the appellant, the appellee loses nothing. The rule here declared is substantially the same as that laid down by the Supreme Court of the United

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States in the case of *Goodman v. Niblack*, 102 U. S. 556. In *Robertson v. Cease*, 97 U. S. 646, the same court recognize the rule, that, where it appears that a complaint or declaration may be made good by amendment, it is proper to remand with leave to amend. In *Buskirk's Practice*, a different rule is stated, and several cases are cited. *Buskirk's Pr.* 119. We have carefully examined the cases relied upon by the author, but find in them nothing lending the slightest support to the text. It is undoubtedly true that there may be cases where the court can readily perceive that no amendment can be made which will cure the defect in the complaint, and it was probably that class of cases which the author had in mind when he wrote. His language is: "If the court below possessed no jurisdiction of the subject of the action, or if the plaintiff is seeking to enforce a remedy given by a statute which is unconstitutional, or if, for any cause, it appears of record that the plaintiff has no right to recover, in such cases the court would not reverse the judgment, if there was a cross assignment of errors; for there would be nothing to re-try in the court below." We regard this statement as correct in so far as concerns the class of cases specially named; but we think the general statement, "if for any cause it appears of record that the plaintiff is not entitled to recover," the judgment will not be reversed, is too broad. In every case of a defective complaint it does appear that there is no right of recovery. If it appear otherwise, then a demurrer should be overruled, for, if a complaint is sufficient to show a right to recover, demurrer will not lie. *Teal v. Spangler*, 72 Ind. 380; *Bayless v. Glenn*, 72 Ind. 5. We think the true rule is to remand the case, so as to afford an opportunity to amend in all cases where it does not appear that no amendment can make the complaint good. In cases where it appears that amendment will not make a good complaint, there ought to be an affirmance, for it would be useless to remand the cause. Where, however, it appears that there may be an amendment which will make the complaint state a cause of action, the proced-

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ure most likely to secure substantial justice is to remand at the appellant's costs. This is, as we think, in harmony with the spirit of our code. This course enables the appellant to make good his cause if he can, and denies to the appellees no substantial rights. It leaves the way open for all defences; it cuts off none. If the statute of limitation precludes an amendment, or, if for any cause an amendment is improper or can not be made, the appellee may avail himself of his right to prevent one from being made. In short, by remanding, the case goes back to the trial court, where the rights of the litigants can be fully considered and adjudicated.

Judgment reversed, with instructions to tax all costs in this court, and in the trial court back to the filing of the complaint, against the appellants, and for further proceedings in accordance with this opinion.

NIBLACK, J., dissents upon the ground that, as the complaint was insufficient to have supported a judgment in case one had been rendered upon it, in favor of the appellant, no substantial injury was done to the appellant by erroneous rulings against him at the trial, and that consequently the appellant has no cause to complain that he was not permitted to obtain judgment upon his complaint.

No. 7774.

STELZER ET AL. v. LAROSE, RECEIVER.

RECEIVER.—Appointment.—Partnership.—Pleading.—Vendor's Lien.—Parties.

—In an action by a receiver of partnership property to foreclose a vendor's lien on real estate which he had sold, an answer to the effect that one of the co-partners was not a party to the proceeding in which the appointment of the receiver was made, but not showing that such co-partner was at the time alive and within the jurisdiction of the court which appointed the receiver, nor that he had a substantial interest in the partnership, is not good.

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SAME.—Plea of No Consideration.—If in such case the answer showed that the appointment of the receiver and the sale of the realty were void, it would be a want of consideration, provable under a plea of no consideration, also pleaded.

SAME.—Estoppel.—Collateral Attack.—The vendee of a receiver who has given his note to the receiver for the purchase-money and has accepted, and holds possession under, the receiver's deed, can not, in the absence of fraud or mistake, deny the validity of the receiver's appointment.

VENDOR AND VENDEE.—Fraud.—Known Facts.—Rescission.—A vendee who accepts a deed, knowing that an inchoate interest of a wife in the property has not been extinguished, and takes an agreement from the vendor to adjust and extinguish that interest, or credit a sum upon the last instalment of the purchase price, can not claim that he was deceived as to his vendor's capacity to convey that interest, nor on account of it resist payment of the earlier instalments of the purchase-money. A vendee, who has taken and holds undisturbed possession under his deed, can not resist the payment of purchase-money on account of defects in the title, or outstanding interests, unless he has been compelled to buy in such interests or has suffered substantial injury on account thereof.

SAME.—Rescission.—Rents and Profits.—The vendee, who has been in possession of improved property, can not rescind without offering to reconvey and to account for rents and profits, or the value of the use.

VENDOR'S LIEN.—Foreclosure.—Practice.—Harmless Error.—A decree of foreclosure of a vendor's lien should require that the vendee's personal property be first exhausted, but, if this is omitted without objection or exception, the error will not be available on appeal.

From the Cass Superior Court.

G. E. Ross, for appellants.

M. Winfield and *Q. A. Myers*, for appellee.

WOODS, J.—Dennis Uhl, as receiver of the "People's Bank," sued the appellants upon the promissory note of the appellant Adams, made to Uhl as such receiver, alleging that the note was given for a part of the price of real estate sold and conveyed by the receiver to the said Adams, and praying a decree for the enforcement of a vendor's lien. The appellant Catharine was made a party only because she was the wife of her co-appellant, and need not be further noticed; and any mention of the appellant or the defendant hereinafter made will be understood to refer to the appellant Adams.

The complaint was demurred to, but no question is made

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of its sufficiency. It is insisted that the court erred in sustaining demurrers to the third, sixth, seventh and eighth paragraphs respectively of answer, and to the first and second paragraphs each of the appellant's cross complaint, and in the overruling of his motions for a new trial and in arrest of judgment.

Besides the general averments of the complaint already indicated, it was alleged therein that the real estate, for which the note sued on was given, was sold to the defendant under an order of the court, the deed having been executed by the receiver, approved by the court and delivered to the defendant, but not recorded. Uhl having resigned the receivership, LaRose was appointed in his stead and his name substituted in the record.

The first and second paragraphs of answer respectively are pleas of payment and no consideration.

The third paragraph is, in substance: That at the time of the supposed sale of the real estate, for which the note in suit is alleged to have been given, Uhl was not, nor has he been, nor is he now, the legally appointed receiver of the firm known as the People's Bank, for the reason that, at the time of his supposed appointment, the firm was composed of William H. Standley, William H. Whiteside, Josephus H. Atkinson and Edward R. Thompson; that Thompson was not a party, either plaintiff or defendant, to the proceedings under which the appointment was made, and had no notice thereof; that the appointment is therefore void and the sale a nullity. Wherefore the consideration of the note has failed.

If in fact the sale was a nullity, it was not a failure but a want of consideration, which might have been proved under the second paragraph of answer; and so, whether right or wrong, the ruling complained of was harmless.

The paragraph, however, is manifestly insufficient in itself, even if it were conceded to have been necessary to make all members of the firm parties to the proceeding, and that the question could be raised in this collateral way. It is not shown

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that Thompson was living and within the jurisdiction of the court which appointed the receiver. The facts stated, therefore, would not have constituted a good plea in abatement to the application for the appointment of the receiver, and a *fortiori* must be deemed insufficient as now presented.

Besides, it is not alleged that Thompson had any substantial interest in the partnership property or in the real estate in question; and, the appellant having received a deed and being presumably in undisturbed possession of the property, the rule is familiar which denies him the right to resist payment of the purchase price. *Axtel v. Chase*, 77 Ind. 74. By the terms of his contract, he recognized the payee of the note in suit as receiver, and in the absence of mistake or fraud he can not under the circumstances be heard to question the validity of the appointment.

The substance of the sixth paragraph of answer is: That the firm known as the People's Bank was indebted to the defendant in the sum of \$5,000, for which he held a certificate of deposit; that the plaintiff represented to the defendant that he was the legally appointed receiver of the firm, and had authority to convey the real estate described in the complaint, and offered to make to the defendant a good and sufficient title therefor, in consideration that the defendant would surrender his certificate of deposit, pay to the receiver ninety days thereafter \$3,000 in money, and one year thereafter \$2,000 in certificates of indebtedness of the firm, the plaintiff also agreeing to extinguish a contingent interest which the wife of William H. Whiteside claimed to have in the property, or, if not extinguished, that that interest should not exceed \$1,111, and should be retained out of the last payment to be made by the defendant in the certificates of the firm; that the defendant accepted the plaintiff's offer; surrendered his certificate of deposit, and gave the note sued on for \$3,000, to be paid in money; and the plaintiff gave the defendant the written agreement, filed with the plea, whereby he agreed to extinguish the interest of Mrs. Whiteside in the

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real estate, or to have it adjusted with her at the sum aforesaid, and deducted from the defendant's last payment; that said agreement is the only note or memorandum of the contract signed by Uhl, or by any person in his behalf; that the only title which, as receiver, Uhl had to the property, was derived by a deed of conveyance made to him by William H. Whiteside and William H. Standley, who were the equal owners thereof as tenants in common; that the wife of Whiteside, then and now living, did not join in making the deed and never has joined her husband in conveying the property, and has a contingent interest of one third in fee simple of the undivided one half thereof, which the plaintiff has not extinguished nor reduced to the sum of \$1,111, or to any definite sum, but that at the price at which the defendant made his purchase, that interest exceeds said sum; that the same is now in litigation in a suit pending between the plaintiff and Mrs. Whiteside and others; that the plaintiff has not made and can not make a good and sufficient conveyance of the property in accordance with the contract, and, though often requested, has failed and refused so to do. Wherefore the consideration of the note has failed.

The agreement referred to corresponds with the allegations made concerning it, and need not be copied.

The argument of the appellant's counsel in reference to this plea proceeds mainly upon the theory that the plaintiff is shown to be in default, in that he had not conveyed in accordance with his agreement, and was therefore not entitled to sue; and further, that the agreement to convey was within the statute of frauds and not so far performed as to be made binding on the parties. The argument is not sound. It is alleged in the complaint, that the plaintiff had conveyed the property to the defendant by a deed made under the order and approval of the court. This allegation the answer does not controvert. It is, to be sure, averred in the answer, that the plaintiff had not made and could not make a good and sufficient deed; but this, taking the complaint and answer to-

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gether, means no more than that the plaintiff had not made and could not make a deed, good and sufficient to convey the interest of Mrs. Whiteside, and is not a denial of the allegation in the complaint that the plaintiff had conveyed. *Axel v. Chase, supra.*

Indeed, it is manifest that the defendant did not act under any mistake or misapprehension in reference to the receiver's title and power to convey. He knew of the interest of Mrs. Whiteside, and that a deed from the receiver could not transfer or affect it, and accordingly took the receiver's agreement to extinguish or reduce that interest to a sum named which should be credited on the last payment to be made for the property. No such actionable breach of that agreement is shown as constitutes a defence to the plaintiff's present action. No time is named in the agreement within which the outstanding title was to have been extinguished or adjusted; and though the interest is alleged to be worth more than the sum to which it was to have been reduced, it is not shown that it exceeds the amount of the final payment against which it was agreed to be set off.

In short, the situation of the appellant, as shown by this paragraph of the answer, is less favorable than that of a purchaser of realty who has received a deed and is in possession of the property, but is seeking to resist payment of the purchase-money, on account of an outstanding interest, without showing that he has been compelled to buy the interest in, or has in any way been injured on account of it. It is settled by numerous decisions that this can not be done. *Axel v. Chase, supra*; *Strell v. Hughes*, 72 Ind. 186, and cases cited.

The seventh paragraph of the answer differs from the sixth only in that it contains allegations that the plaintiff falsely represented, and the defendant, not knowing nor having the means of knowing the contrary, relied upon the representation, that the plaintiff, as such receiver, had power to convey the property.

The plea is no better for these averments. Indeed, it is

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evidently not true that the defendant believed and relied upon these representations, if they were made. He knew of the outstanding interest, and, for the purpose of securing its adjustment, took from the receiver a contract which is apparently a sufficient safeguard against injury from that direction. He is in undisturbed possession of what he bought, under a deed which is good for all it was expected to convey.

The eighth paragraph is not materially different from the third. It contains the additional allegation, that the defendant was ignorant of the plaintiff's want of authority, under his pretended appointment, to make the sale; but, for the reasons already sufficiently developed, this averment is meaningless, and does not help out the plea.

The first and second paragraphs of the counter-claim respectively contain the same averments as the sixth and seventh paragraphs of answer. The prayer of each is for a rescission of the contract, the defendant offering to surrender possession of the property, and demanding the return of his certificate of deposit and a cancellation of the note in suit.

Besides what has already been said concerning the answers referred to, it may be observed that no offer is made by the defendant to reconvey the property to the plaintiff, nor to account for the rents and profits or the value of the use and occupation. The pleadings show that there was a bank building on the property, and some averment concerning the rents or profits was therefore clearly necessary in a complaint for rescission. *Axtel v. Chase, supra.*

The motion in arrest was properly overruled; and the views already expressed make it unnecessary to enter minutely upon the inquiry whether the verdict is sustained by sufficient evidence. There is no essential particular in which it can be justly claimed that there is an entire lack of evidence to support the verdict for the appellee.

The court so framed its decree as to authorize the sale of the real estate in satisfaction of the vendor's lien, before exhausting the defendant's personalty. This was wrong. *Martin*

Workman v. Shelly et al.

v. *Cable*, 72 Ind. 67. But the appellants took no exception to the form of the decree, and made no motion to modify it. They have, therefore, each waived the error. *Bayless v. Glenn*, 72 Ind. 5; *Teal v. Spangler*, 72 Ind. 380; *Douglass v. The State*, 72 Ind. 385; *Adams v. LaRose*, 75 Ind. 471.

The order for the sale of the land in satisfaction of the lien was in itself right as against both appellants, and while there ought to have been an order requiring the personalty of the debtor to be first exhausted, if either appellant had requested it, it is clear, under the decisions cited, that the objection can not be first made in this court. Upon this point the case of *McCauley v. Holtz*, 62 Ind. 205, is not in harmony with the more recent cases.

The judgment is affirmed, with costs.

No. 8429.

WORKMAN v. SHELLEY ET AL.

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149	133
79	442
155	59

MALICIOUS PROSECUTION.—*Want of Probable Cause.*—*Attorney.*—*Demurrer to Evidence.*—On trial of an action for malicious prosecution, in procuring the indictment of the plaintiff for perjury in making an affidavit for the removal of a cause from a justice of the peace to the circuit court, evidence that the defendants were before the grand jury, not of their own motion, but in obedience to legal process, that the deputy prosecutor was attorney for one of the defendants in the civil case, and was familiar with it, and advised them that, if the facts were true as they stated them to him, there was good cause for a prosecution, was insufficient to show a want of probable cause, and a demurrer thereto was rightly sustained.

SAME.—*Burden of Proof.*—*Malice.*—In such case, the burden of proof lay upon the plaintiff to show a want of probable cause as well as malice, and a prosecution begun and ended.

From the Boone Circuit Court.

C. S. Wesner, for appellant.

J. W. Clements and F. M. Charlton, for appellees.

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BICKNELL, C. C.—This was a suit by the appellant against the appellees for malicious prosecution. The complaint alleges that the appellees went before the grand jury and there, without any probable cause, charged the appellant with having feloniously and falsely committed wilful perjury in a certain affidavit sworn to by him before a justice of the peace, in an action pending before said justice, relating to the possession of land, and that, without any probable cause and maliciously, they procured said grand jury to find an indictment charging the appellant with perjury in said affidavit; that the appellant was arrested upon said indictment, which was afterwards quashed by the court and appellant was discharged. The complaint claims \$5,000 damages.

The affidavit was made for the purpose of removing the case pending before the justice to the circuit court, on the ground that the title to land was in issue, and the indictment was bad because it appeared that in the affidavit the appellant was swearing to a conclusion of law, from certain facts alleged, which facts were not averred to be false. *The State v. Woolverton*, 8 Blackf. 452.

The appellees answered by a general denial; the cause was tried by a jury; the appellees demurred to the evidence, and their demurrer was sustained; judgment was rendered for the appellees, and this appeal was taken.

The only question presented by the errors assigned is, Was the demurrer to the evidence rightly sustained?

The evidence shows that only four of the defendants have their names endorsed upon the indictment as witnesses for the State, and that none of them went before the grand jury of their own motion.

The deputy of the prosecuting attorney testified as follows: "I was deputy prosecuting attorney before the April term, 1878, and have been ever since. I know the defendants; they were before the grand jury as witnesses at the term the indictment was found. I don't know that they were all there; John Shelly was there, and I think George

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Shelly, and I know the old lady was there, for I took her over there myself. They were before the grand jury either on a subpoena, or else I had them brought in by the grand jury bailiff. I got Mrs. Shelly and took her over, but whether the others were subpoenaed or not I am not sure, but I know they were either subpoenaed or brought in by the bailiff. I was the attorney for Mrs. Shelly in the suit at Jamestown." It will be observed that this was the suit in which the alleged false affidavit was made. "I was familiar with the matters in that case, and I told them that if the facts were true as they stated them to me, there was a good cause for a prosecution. I know I got them before the grand jury, but I don't remember just how; they were here in town that day, but their business I think was in connection with a civil cause."

Ellis G. Darnall testified: "I was bailiff of the grand jury. I served a subpoena on two of the Shellys and one of the Gordons to appear before the grand jury as witnesses. I found them here in town." There was no other testimony in reference to the appearance of any of the appellees before the grand jury.

This evidence shows that those of the appellees who went before the grand jury went in obedience to legal process; the deputy prosecutor says, "I know I got them before the grand jury." The evidence also shows that this same prosecutor had been Mrs. Shelly's attorney in the suit in which the affidavit, alleged to be false, was made, and "was familiar with the matters in that case," and that he, the officer of the State having charge of such prosecutions, advised the appellees that "if the facts were true as they stated them to him, there was a good cause for a prosecution."

It will be observed also that there is no evidence at all that the facts stated by the appellees to the prosecuting attorney were not true, and they had a right to state facts to the prosecutor, and to assume that his advice was right that such facts made good cause for a prosecution, yet even after receiving such advice they did not go before the grand jury until the

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prosecutor had them brought in by subpœna or by the grand jury bailiff.

The burden of proof lay upon the appellant to show want of probable cause for the prosecution, as well as malice and a prosecution begun and ended. The evidence in this case does not show want of probable cause. *Adams v. Lisher*, 3 Blackf. 241 (25 Am. Dec. 102); *Burgett v. Burgett*, 43 Ind. 78; *Galloway v. Stewart*, 49 Ind. 156; *Scotten v. Longfellow*, 40 Ind. 23; *McCullough v. Rice*, 59 Ind. 580; *Smith v. Zent*, 59 Ind. 362.

The demurrer to the evidence was rightly sustained. There is no error in the record. The judgment of the court below should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things affirmed, at the costs of the appellant.

No. 8795.

KEISER v. LINES ET AL.

SUPREME COURT.—*Practice.—Judgment.*—No objection to a judgment can be urged in the Supreme Court, that was not made in the court below.

BILL OF EXCEPTIONS.—*Record.*—A paper purporting to be a bill of exceptions, which is not signed by the judge, can not be regarded as a bill of exceptions.

From the Henry Circuit Court.

D. W. Chambers, for appellant.

BEST, C.—This was an application by the appellant for license to sell intoxicating liquors. The appellees filed a remonstrance against the application. The board of commissioners denied the application. The appellant appealed to the circuit court, where the cause was tried and the license denied. From the judgment the appellant appealed to this court, and

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the judgment was reversed. *Keiser v. Lines*, 57 Ind. 431. After the reversal, the cause was submitted to a jury, and a verdict returned against the appellant. Over a motion for a new trial, final judgment was rendered upon the verdict, from which the appellant appeals, and insists that the court erred in overruling the motion for a new trial, and in rendering the judgment upon the verdict.

No objection was made to the judgment below, and hence no question arises upon it here.

The motion for a new trial embraces many questions, none of which were attempted to be saved otherwise than by a bill of exceptions. The clerk has copied into the record a paper purporting to be a bill of exceptions, which embraces many questions arising during the progress of the trial in the admission and exclusion of evidence, and in giving and refusing to give instructions; but, as this paper is not signed by the judge, it can not be regarded as a bill of exceptions. In the absence of a bill of exceptions, there is no question in the record. The judgment should, therefore, be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at appellant's costs.

No. 8139.

SIMS v. THE CITY OF FRANKFORT ET AL.

CITY.—Streets.—Lot Owner.—Prescription.—Injunction.—Complaint.—Answer.

—In an action for injunction, by a lot owner against a city, where the complaint alleged that plaintiff's lot had been improved with reference to the recognized line of the street as laid out and used for more than twenty years, and while the municipal officers stood by and saw such improvement made without objection, and that the city was about to sever from the side of the lot a strip of ground claimed as a part of the street, without an assessment and tender of damages, an answer that an ordinance to improve the street was duly passed, notice given, proposals

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124	131
127	293
79	446
128	84
128	382
128	386
129	467
79	446
130	521
79	446
131	379
133	164
133	335
133	564
79	446
134	563
136	177
136	620
79	446
137	254
138	110
79	446
140	135
140	684
141	6
79	446
144	60
145	48
146	93

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received and a contract made for grading and gravelling the street, and that, upon a survey by the proper officer, the strip of ground appeared to be a part of the street properly dedicated to the public use and platted in the original plat, was sufficient on demurrer.

ADVERSE POSSESSION.—*Title.*—*Fee.*—The title acquired by adverse possession is a fee.

SAME.—*Street.*—*Permissive Possession.*—*Prescription.*—Mere permissive possession of a part of a street for the statutory period of limitation will not confer title. There can be no permanent rightful possession of a public street.

ESTOPPEL.—Where both parties meet upon equal terms and possess the same opportunities of knowledge, and there is neither a false statement nor a fraudulent concealment, there can be no equitable estoppel.

SAME.—*Pleading.*—*Intendment.*—Where an estoppel is relied upon, it must be pleaded with particularity and precision; nothing can be supplied by intendment.

PLEADING.—*Bad Answer.*—*Demurrer Overruled.*—*General Denial.*—Where a demurrer is overruled to a bad answer, the court holds that to be a bar which is not a defence, and the fact that the general denial is also pleaded does not render the ruling immaterial.

INJUNCTION.—*Adequate Remedy by Appeal.*—An injunction will not be granted where the party seeking it has a plain and adequate remedy by appeal.

SAME.—*Performance or Non-Performance of Contract.*—Parties can not, in an injunction suit, litigate a question as to the performance or non-performance of a contract.

STATUTE OF LIMITATIONS.—*Municipal Corporations.*—*Public Rights.*—Municipal corporations, as respects public rights, are not within the ordinary limitation statutes.

STREETS.—*Licensee.*—*Surrender.*—A municipal corporation can not surrender the public streets to a mere licensee, nor can it, by failing to improve a part of a street, abandon the right to the part not improved.

SAME.—*Councilman.*—*Ordinance.*—The consent of a councilman can not affect the force of an ordinance directing the improvement of a street, enacted by the municipal legislature, or give a right to fix the lines of a street and complete an unfinished contract.

SAME.—*Presumption.*—*Damages.*—The presumption is that a street was legally laid out and opened, and that property owners damaged thereby claimed and received compensation.

From the Clinton Circuit Court.

L. McClurg, J. V. Kent and J. N. Sims, for appellant.

*A. E. Paige, O. E. Brumbaugh, S. O. Bayless and ———
Hines, for appellees.*

79	446
153	538
79	446
161	500
162	500

79	446
166	370

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ELLIOTT, C. J.—Exhibited in an abridged form, the material allegations of the appellant's complaint are these: Appellant is the owner in fee of a lot, bounded on the west by Jackson street, in the city of Frankfort, as said street has been laid out and used by the city and its predecessor, the town of Frankfort, for more than twenty years; that the line of his lot has been known and recognized, as it is indicated by his fence, for more than twenty years; that under an order of the proper municipal authorities, and by a license from them, appellant has constructed a sidewalk along the line of his property on Jackson street; that his lot was improved with reference to the recognized line of the street, by the erection of a valuable fence; that the municipal officers stood by and saw such improvement made without objection; that the city is about to sever from the east side of the appellant's property a strip of ground thirty inches in width, claiming that it is part of Jackson street; and that no damages have ever been assessed or tendered. An injunction is prayed.

The second paragraph of the defendant's answer is in substance, as follows: That an ordinance was duly passed for the improvement of Jackson street; that due notice was given, proposals received for grading and gravelling the street, and a contract entered into; that upon a survey by the proper officer, it was ascertained that the strip of ground on the east end of the lot owned by appellant is a part of the street, "and," to use the language of the pleader, "is properly dedicated and platted as a part of said street as dedicated to the public use in the original plat."

A demurrer addressed to this answer by the appellant was overruled, and of this ruling complaint is here made.

It may be true, that the defence interposed by this answer could have been given in evidence under the general denial pleaded by the appellees; for it is the rule declared by statute, that, in actions to quiet title to, or to recover the possession of, real estate, all defences, legal or equitable, may be given in evidence under the general denial. Whether this rule does or

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does not apply to the present case, we need not stop to inquire. If it were conceded that it does, still the appellees had a right to plead specially, and take the judgment of the court on their answer. *Abdil v. Abdil*, 33 Ind. 460. If their special answer is bad, then the appellant has a just right to complain of a ruling declaring it to be good. There is a plain distinction between overruling a demurrer to an answer and sustaining it in cases where the defence is available under the general denial. In case the demurrer is sustained, the defendant is not injured, for the denial secures him all that the special plea could do; but where a demurrer is overruled to a bad answer, it is otherwise, for in such a case the court holds that to be a bar which is not a defence. *Over v. Shannon*, 75 Ind. 352. The fact, that the general denial was pleaded, does not render the ruling upon appellant's demurrer immaterial. It is important, therefore, to ascertain and determine whether the answer under immediate mention is or is not sufficient.

If the adverse possession claimed by the appellant gave him a title to the strip of ground in dispute, then the answer must be held bad. A title acquired by possession is a fee. Professor Washburn says: "It should be clearly understood that the title thereby acquired is, and must be, if anything, a fee." 2 Washb. Real Prop. 49; 2 Hill. Real. Prop. 160. The appellant, if he acquired any title at all to the strip claimed by him, acquired the highest and most perfect title known to the law. There can, therefore, be no fair debate as to the nature of his title, if once it be granted that any title at all was acquired by him.

The real question is, did appellant acquire title by adverse possession to the strip of ground here the subject of controversy? In support of his contention that possession vested title, his counsel refer us to the cases of *Bauman v. Grubbs*, 26 Ind. 419; *Hargis v. The Inhabitants, etc.*, 29 Ind. 70; *Cartright v. Briggs*, 41 Ind. 184. The cases first cited declare that color of title is not essential to give validity to a title

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acquired by twenty years adverse possession. The last of the cases mentioned decides, what the statute expressly enacts, that the statute of limitation will run against the State. If the appellees were claiming a right to property other than that of a public nature, such as is a right in a public highway, these cases would be strongly in point and probably decisive of the case. But the municipal corporation is endeavoring to make good the rights of the public in a highway, part of which has been long in public use, pursuant to a valid dedication. Reference is also made to the case of *Brooks v. Riding*, 46 Ind. 15. As we read that case it is hostile rather than friendly to the appellant's contention. The argument of counsel in the case cited was precisely the same as that here made, but the court refused to sanction it. Many cases are examined, and it is held that mere permissive possession of a part of a street will not confer title. The doctrine asserted by Judge Dillon is approved. The following quotation is made from his work on Municipal Corporations: "As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and can not alien public streets or places, and no laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found, that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author can not assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes." The author quoted, in the last

edition of his work, has fortified his text by the citation of many additional cases, among others the case of *Brooks v. Riding*. Dill. Mun. Corp., 3d ed., section 675. It would be strange, as Judge Dillon suggests, if a municipal corporation having no right to divest the rights of the public, might by mere permissive neglect invest an intruder with title to a public highway. The danger likely to result from permitting public rights to be lost by the failure of the municipal authorities to guard the public interests, is strikingly shown by Mr. Justice SERGEANT in *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469. In the course of his discussion this learned judge said: "Individuals may reasonably be held to a limited period to enforce their right against adverse occupants, because they have interest sufficient to make them vigilant. But in public rights of property, each individual feels but a slight interest, and rather tolerates even a manifest encroachment, than seeks a dispute to set it right." We find in our own reports a case strongly against the appellant. *Indianapolis, etc., R. R. Co. v. Ross*, 47 Ind. 25, where it is held that a railway company can not acquire title to a public street by possession.

Starting from a somewhat different point, we shall find settled rules which will lead us to the conclusion that a title to a public street can not be acquired by possession for the statutory period. There can be no permanent rightful private possession of a public street. The obstruction of a public street is a nuisance, and as such is punishable by indictment. *The State v. Berdetta*, 73 Ind. 185.

No man can acquire a right to maintain a public nuisance by prescription. Each day's continuance of a nuisance may be an indictable offence. *People v. Cunningham*, 1 Denio, 524; *Commonwealth v. Upton*, 6 Gray, 473; *Taylor v. The People*, 6 Park. Cr. Rep. 347; *The Queen v. Brewster*, 8 Up. Can. C. P. 208; *Rhodes v. Whitehead*, 27 Tex. 304; *Cross v. Mayor of Morristown*, 18 N. J. Eq. 305. In *Ellis v. The State*, 7 Blackf. 534, a different doctrine is declared. This case is not only in conflict with the great weight of the decisions of other

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courts, but is also in irreconcilable conflict with the later case of *The State v. Phipps*, 4 Ind. 515, and must be regarded as overruled by it. In the case last named, it was said: "That such an obstruction of a public highway is a common nuisance there can be no question. 1 Hawk. P. C.—4 Blacks. Com. 167.—*The State v. Miskimmons*, 2 Ind. 440. * * * Nor would even a prescription from a twenty years' continuance of the nuisance be of any avail to him." The appellant, in placing upon the public street a permanent obstruction, was, in contemplation of law, guilty of a public offence, and can not claim to have secured rights by violation of law. It is evident that the appellant did not intend to take any part of the public street, and that he acted in good faith, but upon a mistake as to his rights. While this is true, it is equally true that the trustees of the public did not surrender, nor mean to surrender, any public rights. Indeed, they could not have surrendered such rights had they expressly undertaken to do so.

It may well be doubted whether the statute of limitations applies to the State in its sovereign capacity. It may well be held that the limitation is not applicable to the exercise of the attributes of sovereignty. It often happens that the State deals as a citizen in selling property or making contracts, and when it so acts the statute clearly applies. *Gray v. The State, ex rel.*, 72 Ind. 567. But where sovereign rights incapable of surrender or alienation are concerned, it may be seriously questioned whether the statute limits or restrains. Upon the question, however, we give no opinion.

The complaint does not state such facts as estop the city of Frankfort from asserting a claim to the part of the street within appellant's enclosure. It has long been the settled law, that where an estoppel is relied upon, it must be pleaded with particularity and precision. *Robbins v. Magee*, 76 Ind. 381. Nothing can be supplied by intendment. We can not, therefore, adopt appellant's theory that the facts pleaded may by intendment conclude the appellees.

There are many reasons why the facts alleged in the com-

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plaint can not be held to work an estoppel. It appears that both parties had at least equal opportunities of knowledge. The facts were as fully known to the appellant and his grantor as to the municipality. There was not ignorance on one part and knowledge on the other; there was certainly knowledge on the part of the appellant. The recorded plat was to him constructive knowledge of the limits of the street. So, too, were the boundaries of his own lot. There could not, in such a case, be a reliance upon the acts of the municipal authorities. Where both parties meet upon equal terms, and possess the same opportunities of knowledge, and there is neither a false statement nor a fraudulent concealment, there can be no equitable estoppel.

It does not appear that the lines of the street were fixed by the corporation. The allegations of the complaint are, that "the plaintiff has, in obedience to an ordinance of said town of Frankfort, and by its license and authority, laid down and constructed and improved a sidewalk on Jackson street, in front of his property, and adjusted the improvement of his front yard thereto, consisting of a valuable picket ornamental fence and yard gate, of the value of about \$35, and also a brick paved walk leading from his front hall door to said gate and steps in said gateway, leading onto said street." The meaning to be ascribed to these statements is, that appellant himself laid out the line of the pavement. He avers that he constructed the pavement under the license and authority of the corporation, and this can not be held to mean that lines and distances were fixed and adjusted by the corporate authorities. The meaning we have affixed to the statements of the complaint is the only one it would bear if the most liberal rules of construction were adopted, and all doubts resolved in appellant's favor. When the complaint is measured by the strict rules which prevail in all cases where an estoppel is relied upon, it is very plain that no presumption in appellant's favor can be indulged, which will warrant the conclusion that he was misled to his prejudice by lines fixed by the municipality. Acting under leave and license is very far from acting under orders or directions.

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The question whether there can in any case be an equitable estoppel by the mere passive inaction of the municipal officers is a very doubtful one. We need not here discuss or decide it. The acts done by the appellant are not of a character entitling him to successfully assert that there is an estoppel. If he did act under the license of the municipal authorities and is injured to the extent of the value of his improvements, he can not be entitled to anything more than to compensation for his loss, if indeed to that. He can not by such an improvement as that shown in his complaint acquire title to a public street. It is said by a recent author: "An injunction will not be allowed to prevent the authorities of a city from exercising their control over the opening or widening of public streets or highways, or from interfering therewith at the suit of one whose only right is based on twenty years adverse user and possession, and in the absence of other equities. * * Nor will equity interpose to prevent the commission of alleged torts or trespasses which consist simply in such acts as are incident to the widening of a street and the removal of a portion of a sidewalk under proper authority, but will leave the parties to such redress as is afforded by the ordinary legal tribunals." 1 High Injunctions, sec. 588. Whatever may be the rule where it appears that great expenditures have been made and acts done for which compensation can not be fully made, it is plain that where there has been a small expenditure of money for which full compensation can readily be made, title can not be acquired in a public highway by estoppel. But back of this lies the fundamental doctrine, that the municipal corporation has no power to sell or barter away the public streets, and of course no right to surrender them to a mere licensee. What it can not alien for a full consideration it can not bestow as a mere gratuity. *Pettis v. Johnson*, 56 Ind. 139; *Kreigh v. City of Chicago*, 86 Ill. 407.

The fee in the street does not vest in the municipal corporation, but it does take a right to the street as the trustee of the public, of which it can not be divested except by the para-

mount law. The corporation can not extinguish the public use in the streets. 2 Dill. Munic. Corp., section 650. Under our law a street can not be vacated upon petition unless two thirds of the property owners consent. *Spiegel v. Gansberg*, 44 Ind. 418. It is held in other States, that the municipal authorities can not vacate a public street without the consent of the Legislature of the State. *Polack v. S. F. Orphan Asylum*, 48 Cal. 490. Equity will restrain the unauthorized alienation of streets. *Attorney General v. Goderich*, 5 Grant Ch. (Can.) 402; *Guelph v. Canada Co.*, 4 Grant Ch. 632; *Barclay v. Howell*, 6 Pet. 498; *Bell v. Foutch*, 21 Iowa, 119. The corporators, and the inhabitants of the municipality are the corporators, and have no right to act upon the belief that the officers representing the corporation can by express deed, or permissive acquiescence, surrender public rights. In such cases as the one at bar the law prohibits the acquisition of title against the public, and of this no citizen, much less a corporator, can aver ignorance.

We are not called upon to decide whether the appellant is entitled to maintain his action upon the ground that an established grade was changed without tendering compensation. The complaint does not show that any grade was ever established by the corporate authorities. It can not be presumed from the fact that the street was used and travelled, that a grade had been established. If the appellant relied upon a change of grade as entitling him to an injunction, it was for him to allege facts showing that a grade had been once fixed by the corporation. All acts are presumed to be rightfully done until the contrary appears. This presumption is very frequently applied to the acts of the officers of municipal corporations. It was not necessary that the answer should allege that the officers had not been guilty of a wrong.

The third paragraph of appellant's reply alleges that "the grade mentioned and described in the second paragraph of the answer, as surveyed by the city engineer, involves ten feet, the full width of the grade and improvement specified in the ordinance, east and outside of the plaintiff's premises." This

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does not avoid the answer. If, as the answer explicitly avers, the strip in controversy was within the limits of Jackson street, appellant could not acquire title, because the ordinance did not provide for the improvement of the full width of the street. A municipal corporation, by failing to require the improvement of part of a street, does not abandon the right to the part not improved. If, on the other hand, the strip will not fall within the limits of the public street, the appellant can not be injured by the enactment and execution of the ordinance, for he does not show by his pleading that the corporation asserts a right to anything more than the street.

The fourth paragraph of the reply alleges that appellant has held adverse possession for more than twenty years. The question presented upon the ruling sustaining appellee's demurrer to this paragraph has been disposed of in discussing the sufficiency of the second paragraph of the answer.

The first paragraph of a supplemental complaint alleges that the contractor failed to perform his contract and had abandoned it; that he left the work in an unfinished condition; that appellant obtained the consent of one of the common councilmen of the city to himself complete the work, and that he did complete it at his own expense. There are many reasons why this supplemental complaint is bad.

A contractor restrained by an injunction can not be adjudged to be in default at the demand of the person who obtained the injunction. The appellant himself secured the order which stopped the work, and he can hardly be considered to be in a situation to avail himself of the effect of an order which the contractor dare not disobey.

Whether the contractor had or had not performed his contract, is not a question to be tried in a suit for injunction. Injunctions are not issued for the purpose of enabling parties to litigate a question as to the performance or non-performance of a contract.

Injunctions do not issue where there is another plain and adequate ordinary remedy. In cases like that attempted to

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be made by the supplemental complaint, the remedy is by appeal. It is expressly provided that the property owners may appeal from the order granting a precept, and where there is such a remedy expressly provided by statute, injunction will not lie. *Marshall v. Gill*, 77 Ind. 402; *Hume v. Little Flat Rock, etc., Co.*, 72 Ind. 499.

The consent of one councilman can not affect the force of an ordinance directing the improvement of a street, enacted by the municipal legislature. An individual member of the council has no right to make a contract which will bind the corporation. The allegation in the supplemental complaint, that the appellant obtained the consent of one of the councilmen, gave him no right to fix the lines of the street and complete the contract.

The court made a special finding of facts, in which nearly all of the material questions are found against the appellant. The case upon the finding is nothing like as strong in appellant's favor as that presented by the complaint and the second paragraph of the answer. The appellant insists that, as the finding does not show that the street covered the strip in controversy, it must be deemed to be against the appellees. We think it does show this. If it did not, the appellant would not be entitled to judgment. The burden is upon him to show that he owned the strip of ground claimed. He must recover upon the strength of his own title. It is well settled, that, where the special finding is silent upon a material point, it is to be deemed to be adverse to the party who has the burden of proof. In this instance the appellant has the burden, and the finding is to be regarded as adverse to him.

It was not incumbent upon the city to prove that the street was originally dedicated or laid out according to law. In *Kalbrier v. Leonard*, 34 Ind. 497, it was said: "We must presume that the street was legally laid out and opened, and that if the appellee was damaged thereby, and claimed compensation, he received it."

Judgment affirmed.

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No. 8224.

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DEED.—Condition Subsequent.—Forfeiture.—Demand.—To work a forfeiture of an estate by reason of a condition subsequent, it must appear that there was a demand of performance of the condition and a failure to perform.

SAME.—Non Compos Mentis.—Instruction.—An instruction to the jury, "that if, at the time of executing the deed in question, the grantor had mind to know and comprehend that he was making a deed and thereby conveying the land described in it to his son, and had an object in so doing which he comprehended, then he was of sound mind," is not a correct definition of mental soundness.

SAME.—Action to Set Aside.—Disaffirmance.—Heirs.—Complaint.—A deed executed by a grantor of unsound mind, he not having been so adjudged at the time of making the deed, is not void but voidable only, and he has the right to avoid or ratify it on becoming sane, and his heirs have the same right; and an action by heirs to set aside such deed can not be maintained unless some act disaffirming the deed has been done before commencing the suit; and, if the complaint fail to show this, it is bad on demurrer.

ASSIGNMENT OF ERROR.—Practice.—Supreme Court.—The assignment of error of the insufficiency of one or more paragraphs of a complaint, less than the whole, presents no question in the Supreme Court.

From the Switzerland Circuit Court.

J. D. Works and *J. A. Works*, for appellants.

W. D. Ward and *T. Livings*, for appellee.

WORDEN, J.—This was an action by the appellants, who were heirs at law of Spaldin Ransom, deceased, against John Ransom, the appellee, to set aside a conveyance of certain real estate described, made by the deceased in his lifetime, to the defendant, John Ransom.

The complaint consisted of five paragraphs.

The first and second paragraphs are much alike. They allege the mental unsoundness of the grantor at the time of making the conveyance, and seek to have it set aside and to have partition of the land. They need not be further particularly noticed, no question being legitimately made as to their sufficiency.

79	458
127	444
79	458
135	593
79	458
139	74
79	458
142	534
79	458
145	118
79	458
153	459
79	458
154	372
79	458
158	627
79	458
162	532

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The third paragraph alleged that on the 9th day of December, 1874, Spaldin Ransom was the owner of the land, describing it, and that on that day he conveyed it to the defendant by warranty deed. "That, in consideration of said conveyance, the defendant entered into a written contract, by which he agreed, that, in consideration of said conveyance, he would leave to the said Spaldin Ransom, for and during his natural life, the house in which the said Spaldin Ransom then resided on said land, together with the garden spot and door yard and ground around said house as now enclosed, and that he would furnish to the said Ransom his firewood, ready prepared for use near his door, during his natural life; that the said John Ransom would deliver to the said Spaldin Ransom the one third part of all crops raised on said land, except on the garden spot reserved for the said Spaldin Ransom and the one on the opposite side of the road around the frame building on said land to be occupied by the defendant; that the said Spaldin Ransom should have the dividing of the plums that might grow on the opposite side of the road from his dwelling; that the said Spaldin Ransom should have what fruit he wished to use out of the orchard on said land each and every year during the life of the said Spaldin Ransom.

"The defendant further agreed in said contract, that he would, in consideration of said conveyance, pay to Nancy Miller, wife of David Miller, and daughter of the said Spaldin Ransom, the sum of \$200 one year after the death of the said Ransom; \$200 to Maria Robinson, wife of Winthrop Robinson, and daughter of said Spaldin Ransom, two years after said Ransom's death; and \$150 to Alice Schuff, wife of Samuel Schuff, and daughter of said Ransom, three years after the death of said Spaldin Ransom; and to the heirs of Lucy Dickason, the deceased wife of James Dickason, and daughter of the said Ransom, \$200 four years after the death of the said Spaldin Ransom.

"It was further stipulated in said contract, that the condi-

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tions of the same being complied with on the part of the said defendant, and the payments made as therein provided, should be the full consideration for said tract of land.

"The plaintiffs allege that the defendant has wholly failed, refused and neglected to perform the conditions of said contract, or any of them; that he took possession of said real estate on the — day of October, 1875, and still holds possession thereof; that the said Spaldin Ransom departed this life intestate, on the — day of —, 1876, leaving the plaintiffs and the defendant his heirs at law; that the defendant has received all of the rents and profits of said real estate since he took possession thereof, and has given no account thereof; that said rents and profits so received by him were of the value of \$1,000. Wherefore plaintiffs say that the defendant is not the owner of said real estate, and they ask that said deed be declared of no effect, and set aside; that they have judgment for \$1,000, and for all other proper relief."

The fourth paragraph alleged the conveyance of the land by Spaldin Ransom to the defendant, and the execution of the written contract as set forth in the third paragraph, and then proceeds as follows: "The plaintiffs further allege, that at the time of making said deed the said Spaldin Ransom was eighty years old, and that he was then, and had been for several years, and continued to be until the time of his death, of unsound mind and wholly incapable of transacting any kind of business; that, after said deed and contract were made, the defendant, who was the son of said Spaldin Ransom, well knowing the condition of mind of said deceased, and that he would do anything he was requested to do by said defendant, represented to him that said deed and contract were not properly made and that they were not good, and requested him to make him another deed, and that he, defendant, would make a new contract agreeing to perform all the promises and conditions of the other contract, or have such conditions set out in the deed; and defendant further requested and procured said deceased to deliver up to him or to cancel the contract en-

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tered into between them on the 9th day of December, as above set forth; that said Spaldin Ransom, being then of unsound mind and not knowing the consequences of his act, did release the defendant from his contract, and together with his wife executed to the defendant, October 9th, 1875, another warranty deed for said real estate; that the said Spaldin Ransom was told by his son, the defendant, in order to induce him to execute said deed, that he, the defendant, had executed an agreement to perform all the acts agreed to be done by him in the contract of December 9th, 1874, and that he had bound himself to pay to the daughters of said Ransom the sum of money named in said contract; that, in fact, no such contract was then executed by the defendant, and never has been. Plaintiffs further allege, that the defendant represented to the said Spaldin Ransom, and promised him, if he would make to him said second deed, that he might reserve in said deed the dwelling-house on said land then occupied by said Ransom, during his life, and that such reservation should be set out in said deed; that the defendant himself procured said deed to be written, and, instead of having the same written as agreed with his father, he had the same written without any reservation whatever, the same being written to convey an absolute fee simple interest in said real estate. And plaintiffs further allege, that Spaldin Ransom could not read writing at that time, and did not read said deed or any part of it, and the same was not read to him; that the defendant told said Ransom before he executed said deed, that he had executed said contract as he had promised, and that said deed was written with the reservation therein as he had promised; that the said Spaldin Ransom never knew to the time of his death that his other children besides the defendant had not been provided for as agreed in said first contract, nor that said deed was not written as agreed upon; that the defendant did not comply with said first contract or perform any of its promises or conditions; that he paid no consideration whatever for said real estate, either by performing his said agreement or in any other way; that he took

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possession of said real estate on the — day of —, 18—, and has continued in possession and received the rents and profits thereof ever since, amounting in value to \$1,000."

The paragraph proceeds to allege the death of Spaldin Ransom, and sets out the respective rights to the land claimed by the parties, and prays judgment for \$1,000, that the deeds be adjudged void and set aside, and for the partition of the land.

The fifth paragraph need not be noticed as it was dismissed by the plaintiffs during the progress of the trial.

The defendant demurred severally to the third and fourth paragraphs, for want of sufficient facts, and the demurrer was sustained as to the third, but overruled as to the fourth.

Issue; trial by jury; verdict and judgment for the defendant.

The plaintiffs below, appellants here, have assigned error upon the sustaining of the demurrer to the third paragraph of complaint, and upon the overruling of a motion made by them for a new trial. The appellee has also made a cross assignment of error. Of these in their order.

The appellants claim that the matters to be performed by the defendant as the consideration for the land, as set up in the third paragraph, are conditions subsequent, and that, upon the non-performance of them by the defendant, his title to the land became forfeited.

We need not decide whether or not the stipulations to be performed by the defendant amount to conditions subsequent. If they do not, the paragraph is obviously bad. If they do, it is still radically defective for the following reasons, if for no other: This suit was commenced in 1876, and as it appears in the paragraph that Spaldin Ransom died in 1876, it appears that none of the sums of money to be paid by the defendant were due when the action was commenced. Moreover, no demand appears to have been made for payment.

The stipulations to be performed by the defendant, other than the payment of the money to the children and grandchildren of Spaldin Ransom, were exclusively for the benefit

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of said Spaldin, and he does not appear to have made any demand of performance, which was necessary in order to work a forfeiture of the estate. In the case of *Lindsey v. Lindsey*, 45 Ind. 552, 567, it was held to be "well settled that before there can be a forfeiture of an estate held on condition subsequent, there must be a demand on the part of the person entitled to insist upon its performance, whether the condition consists in the payment of money or the performance of some other act, and a refusal on the part of the person in whom the title is vested." See also *Bradstreet v. Clark*, 21 Pick. 389; *Risley v. McNiece*, 71 Ind. 434.

The demurrer was properly sustained to this paragraph of complaint.

This brings us to the motion for a new trial. The court having instructed the jury that one of the issues in the cause was whether or not Spaldin Ransom was, on the 9th of December, 1874, when he executed the deed to the defendant, a person of unsound mind, said to them as follows: "If, when Spaldin Ransom executed the deed dated Dec. 9th, 1874, he had sufficient mind to know and comprehend that he was making a deed, and that he was thereby conveying the real estate therein described to his son, John Ransom, and had an object in so doing which he comprehended, then he was a person of sound mind."

This charge was clearly wrong, and well calculated to mislead the jury. It can not be true, according to our statutory definition of mental unsoundness, that a person having sufficient mind to know and comprehend that he is making a deed conveying his real estate, having an object in so doing which he comprehends, is necessarily a person of sound mind. A monomaniac might have mind enough to fully comprehend the effect of his conveyance, and have an object in making it which he understands, and yet he may have been prompted to make it by some mental derangement. For example, a father may make a deed to one of his children, the effect of which he fully comprehends, his object being to prevent his other

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children from sharing in the land after his death, acting under some insane delusion in respect to his other children, as that they are his enemies.

The statute provides that "Persons of unsound mind and infants may not alien lands or any interest therein." 1 R.S. 1876, p. 361.

The meaning of the words "persons of unsound mind" is defined by the statute as follows: "The words 'persons of unsound mind,' as used in this act or any other statute of this State, shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person." 2 R. S. 1876, p. 598, section 1.

Monomania is defined to be a derangement of a single faculty of the mind, or with regard to a particular subject only. *Freed v. Brown*, 55 Ind. 310. And yet a monomaniac can not make an irrevocable conveyance of land. The counsel for the appellee have cited the following cases in this State in support of the charge, but they do not sustain it: *Rush v. Megee*, 36 Ind. 69; *Bundy v. McKnight*, 48 Ind. 502; *Lowder v. Lowder*, 58 Ind. 538; and *Todd v. Fenton*, 66 Ind. 25.

For the error in giving the instruction above set out, the judgment below will have to be reversed. Objection is made to some other instructions given, but we deem it unnecessary to notice them. A question is also made as to the competency of some of the witnesses, but as the law on the subject has been in some degree modified since the trial by the revision of 1881, the question as presented may not again arise. We therefore pass it.

We come to the cross assignment of error. The appellee has assigned separately that the first and second paragraphs of the complaint do not state facts sufficient to constitute a cause of action. No question is raised by these assignments. Nothing less than an assignment that the complaint, as an entirety, does not state facts sufficient, will raise any question. This subject was thoroughly elucidated in the case of *Trammel v. Chipman*, 74 Ind. 474.

Cross errors are also assigned upon the overruling of the demurrers to the fourth and fifth paragraphs of complaint.

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The fourth paragraph, we think, was not good. It alleges, that at the time of making the first deed the grantor was not of sound mind. This is all the objection made to that deed. If that deed stands, all that is said about making the subsequent one is of no importance. If that deed was valid, the subsequent transactions can not avoid it. The paragraph can not be good unless it shows not only a right to avoid the first deed, but also a right to go into court to procure a judgment of avoidance.

The deed not being void, but voidable only, the grantor not having been adjudged of unsound mind at the time of making it, he had the right to avoid or ratify it on becoming sane, and his heirs have the same right. But the question is, Can they bring an action to set aside the deed without first having done some act evincing an election to disaffirm it? This they can not do. *Nichol v. Thomas*, 53 Ind. 42. In an action to set aside such deed, a disaffirmance must be shown, or else no right of action is shown, for until there is a disaffirmance there is no right of action.

In an ordinary action to recover land, in which the complaint is general and does not set out the source of the plaintiff's title, an allegation of disaffirmance would be out of place; but in such case the disaffirmance before suit brought would have to be shown by the evidence. But if, in such action, the plaintiff should set out the particulars of his title, and show the specific ground on which he based his claim, he would, doubtless, be required to allege a disaffirmance before suit brought.

For these reasons we are of opinion that the demurrer should have been sustained to the fourth paragraph of the complaint. The ruling on the demurrer to the fifth paragraph is rendered entirely immaterial by the dismissal of it.

The judgment below is reversed, the costs to be equally divided between the appellants and the appellee, and the cause is remanded for further proceedings in accordance with this opinion.

Carter v. Carter et al.

No. 8442.

CARTER v. CARTER ET AL.

SUPREME COURT.—*Verdict.—Evidence.*—The Supreme Court will not disturb a verdict or decision upon a question of fact, when the evidence is conflicting.

WITNESS.—*Impeachment and Corroboration by His Own Statements.*—A witness, whose testimony has been assailed by evidence of his inconsistent statements, may be supported by proof of his declarations made in harmony with his testimony; but he can not be thus corroborated simply because his testimony has been contradicted by other direct evidence.

From the Montgomery Circuit Court.

R. C. Gregory, W. B. Gregory, R. P. DeHart, A. Thomson and T. H. Ristine, for appellant.

W. D. Wallace and A. A. Rice, for appellees.

WOODS, J.—The appellant, who was the defendant in the action, which was commenced in the Tippecanoe Circuit Court, and changed on his application to the court below, claims that the court erred in overruling his motion for a new trial.

Among the causes for a new trial, it is alleged that the verdict is contrary to the evidence and to the law, and that the jury gave excessive damages. These causes all depend upon a single question of fact. The first paragraph of the complaint is for an alleged breach of a parol contract for the delivery of personal property (hogs) by the appellant to the appellees, and, as the price agreed to be paid exceeded fifty dollars, it was necessary for the plaintiffs to prove, as in their complaint they had alleged, that they paid a sum of money to the appellant upon the contract at the time it was made. The appellant insists that there was no evidence on this point in support of the verdict. The record, however, shows distinctly that there was such evidence.

The additional point is made that the court permitted certain questions to be answered by one of the appellees who testified in the case.

The second paragraph of the complaint was to the effect

79	466
137	245
79	466
133	408
79	466
165	442

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that, in a certain settlement made between the appellant and the appellees, a mistake had occurred whereby it was made to appear that the appellees were indebted to the appellant in a larger sum than in truth they were indebted to him, which sum they had paid him in ignorance of the mistake.

The witness had already testified to the fact of the mistake, and had said: "It was a good while afterwards, say two years, before I heard of the mistake." He was then asked: "From whom did you learn that there had been a mistake in the settlement?" to which he answered: "Matt Davidson told me about it, that James Carter had told him of the mistake, was the way I found it out." To the asking of the question and the giving of the answer the appellant objected, and excepted on the ground that the evidence was hearsay; but the court overruled the objection.

For the purpose of explaining his conduct, it was doubtless competent for the witness to state when and from whom he obtained the first information of the mistake; but it was not competent for him to testify what Davidson had told him, and thereby get before the jury hearsay evidence of the declaration of the defendant that the mistake had been made. It is insisted, however, that the error was harmless, because Davidson testified that the defendant did, in fact, make the statement so imputed to him. The appellant, however, denied that he ever made the statement, and testified that the money which was claimed to have been paid to him by mistake in overpayment of the loan which he made to the appellees, was in fact paid upon other considerations, and not by mistake. There was, therefore, a direct question of veracity between the appellant and Davidson as witnesses, to be determined by the jury. They seem to have decided it against the appellant, and this conclusion may have resulted from the proof of Davidson's declaration to the appellee, which the jury probably regarded as a corroborating circumstance.

It is proper, when a witness has been impeached by proof of inconsistent declarations made out of court, to support him

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by proof of declarations which he had made in harmony with his testimony. *Brookbank v. The State, ex rel.*, 55 Ind. 169; *Coffin v. Anderson*, 4 Blackf. 395; *Perkins v. The State*, 4 Ind. 222; *Dailey v. The State, ex rel.*, 28 Ind. 285. But it is not permissible to support his testimony by proof of such declarations, when he has not been assailed with proof of contradictory statements. *Coffin v. Anderson, supra*. The fact that his testimony is directly in conflict with other testimony, does not make his statements out of court admissible as corroborating evidence. If such were the rule, the proof would be too easily manufactured for the occasion to be of value when produced.

Judgment reversed, with costs, and cause remanded, with instructions to grant a new trial.

No. 8878.

POWELL ET AL. v. BUNGER.

JUDGMENT.—Real Estate, Action to Recover.—New Trial of Right.—Payment of Costs.—Condition Precedent.—Under the provisions of section 601 of the civil code of 1852 (2 R. S. 1876, p. 252), the payment of all costs and of the damages, if the court so direct, by the party against whom judgment is rendered, in an action involving the title to real estate, is made a condition precedent to his application for a new trial, as a matter of right; and the court has no discretionary power to dispense with his compliance with this condition, without the consent of the judgment plaintiff.

SAME.—Voluntary Payment of Costs.—Injunction.—Where, in such a case, the party against whom judgment is rendered, with a full knowledge of the facts, but, through a mistake of law, voluntarily pays costs which he was not required to pay, he can not recover of the judgment plaintiff the costs so paid, by execution, fee-bill or otherwise; and where an execution or fee-bill has been issued for the collection of the costs so paid from the judgment plaintiff, he may enjoin the enforcement of such writ.

From the Ohio Circuit Court.

J. B. Coles and *W. S. Holman*, for appellants.

A. C. Downey, for appellee.

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Howk, J.—In this case, the appellee sued the appellants to perpetually enjoin them from collecting certain costs, and to set aside a fee-bill or execution issued therefor. The trial of the cause by the court resulted in a finding and judgment for the appellee for an injunction as prayed for, and for damages in the sum of ten dollars, and the costs of suit. From this judgment, the defendants below have appealed to this court and have here assigned, as errors, several decisions of the trial court, which we will briefly consider and pass upon.

The first error complained of by the appellants is the overruling of their demurrer, for the alleged want of facts, to appellee's complaint. It was alleged in substance, in his complaint, that, on the 19th day of June, 1879, the appellee commenced an action in the court below, against the appellants, Lucinda, George W., William J., and Marcus L. Powell, for damages for disturbing him in the use of a certain alleged highway and a certain private way; that issues were formed in said cause, which were adjudged by the court to involve the title to real estate; that, on the trial of the case, there was a verdict for the appellee on the paragraph of the complaint, relating to the private way, and judgment was rendered thereon; that afterwards the appellants, the Powells, paid up all the costs in said cause, except certain costs which the court had ordered to be taxed to appellee, and thereupon moved the court for a new trial of said cause, as of right, which was granted; that afterwards, at the November term, 1879, of said court, the appellants, the Powells, obtained an order from said court, setting aside the former order granting a new trial, and thereupon, without the appellee's request or consent, paid to the clerk of said court the said costs, which had been so taxed to the appellee, to wit, the sum of \$129.85, and thereupon asked and again obtained the grant of another new trial as of right. The appellee further alleged, that, notwithstanding the said Powells so paid the said costs of their own motion, and to obtain a new trial as of right, and without any judgment to justify the same, they did on the 15th

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day of November, 1879, cause a fee-bill or execution to issue to the sheriff of Ohio county, for the costs so paid by them; and that the sheriff had levied the said writ on the appellee's personal property and was about to sell the same, and would do so, if not enjoined from so doing. Wherefore, etc.

It will be seen from the allegations of the complaint, in the case at bar, that, in the former action between the parties, a new trial was granted the appellants, the defendants, in both actions, as a matter of right, under the provisions of section 601, of the civil code of 1852. Section 601 provides as follows: "The court rendering the judgment, at any time within one year thereafter, upon the application of the party against whom the judgment is rendered, his heirs or assigns or representatives, and upon the payment of all costs, and of the damages, if the court so direct, shall vacate the judgment and grant a new trial. The court shall grant but one trial, unless for good cause shown."

From the proceedings of the appellants in the former case, as stated in the complaint in the case now before us, it is manifest that they were in doubt in regard to the costs, which they were required to pay under the statute, before they would be entitled to demand, as a matter of right, the vacation of the former judgment and the granting of a new trial. It would seem that in the first instance they paid their own costs and those costs which the appellee recovered of them, leaving unpaid the costs taxed by the court against the appellee, and that, upon such payment, they applied for and obtained a new trial under the statute. It would further seem, however, that thereafter they were in doubt in regard to the new trial thus granted, upon such payment of costs; for, afterwards, they applied to the court to set aside the new trial so granted, and, this having been done, they also paid the costs taxed by the court against the appellee, and, upon this latter payment of costs, they again applied for and obtained a new trial, under the provisions of the statute, as a mere matter of right. It will be seen from the section of the statute above quoted, that the trial

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court was thereby authorized to vacate the judgment and grant a new trial only "upon the payment of all costs."

Under this statutory provision, it seems to us that, before the judgment defendant can demand, as a matter of right, the vacation of the judgment and a new trial of the action, he must pay all the costs accrued in the cause except such, if any, as he may have recovered a judgment for against the judgment plaintiff. This section of the code has often been the subject of consideration by this court, and it has been uniformly held that the payment of all costs is thereby made a condition precedent to an application for an order vacating the first judgment, and granting a new trial, as a mere matter of right. The statute, which gives the right to such new trial, does so upon the inflexible condition of the payment of all costs, and the trial court has no discretionary power to dispense with this condition without the consent of the judgment plaintiff. The statute alone confers the right to such new trial, and where all the costs have not been paid, as the statute requires, the right can not be claimed, but is wholly lost. *Zimmerman v. Marchland*, 23 Ind. 474; *Fergerv v. Wesler*, 35 Ind. 53; *Whitlock v. Vancleave*, 39 Ind. 511; *Crews v. Ross*, 44 Ind. 481; *Golden v. Snellen*, 54 Ind. 282.

In the case at bar, we are of the opinion that the payment of the costs taxed to the appellee, and for which no judgment had been rendered either for or against him, was a necessary condition precedent to the appellants' application for the vacation of the first judgment, and for a new trial of the former action.

If it were otherwise, however, under the allegations of the complaint, the appellants, the Powells, were not liable in any manner or to any extent for the costs taxed to the appellee, or any part thereof; and therefore, in their payment of such costs, they were mere volunteers. Where money is paid, with a full knowledge of all the facts and circumstances of the case, such money can not be recovered back upon the ground that the party making such payment supposed he was bound in law

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to pay it, when, in truth, he was not so bound. *Lima Township v. Jenks*, 20 Ind. 301; *The Lafayette, etc., Railroad Co. v. Pattison*, 41 Ind. 312; *The Town of Edinburg v. Hackney*, 54 Ind. 83.

Whether, therefore, the appellants, the Powells, paid the said costs so taxed to the appellee, because, under the law, they were required to pay the same as a condition precedent to their right to vacate the first judgment and obtain a new trial, or were mere volunteers, in the payment thereof, we are of the opinion that they can not, in either event, recover them from or enforce their collection against the appellee or his property. Therefore, the court did not err in overruling the demurrer to the complaint under consideration.

What we have said on this point will also dispose of the alleged error of the court, in sustaining the appellee's demurrer to the appellants' answer. There is no substantial difference between the facts stated in the complaint, and those stated in the answer. It appears from the answer, as well as from the complaint, that the costs in controversy were costs taxed to the appellee, which he did not recover from the appellants, in his first judgment, and which he was required to pay. The appellants were at first in doubt, as to whether the statute did, or did not, require them to pay these costs as a condition precedent to their application for a new trial as a matter of right. They finally concluded to pay, and did pay, the costs in question; but they made such payment voluntarily, with a full knowledge of all the facts of the case, and without the appellee's consent or request. For a payment thus made, they have no claim against the appellee, which the law will enforce. The demurrer to the answer was correctly sustained.

The evidence is not in the record, and, therefore, no question is presented by the alleged error of the court, in overruling the motion for a new trial.

The judgment is affirmed, at the appellants' costs.

Terrell v. Frazier.

No. 8518.

TERRELL v. FRAZIER.

PRACTICE.—Complaint.—Good and Bad Paragraphs.—Motion in Arrest.—Verdict.—If one of two or more paragraphs of complaint is good, and there is a general verdict for the plaintiff, a motion in arrest can not be sustained, nor error assigned, for want of facts stated in the complaint or in any paragraph, especially where the answers to interrogatories show that the verdict rests in part at least on the good paragraph.

CONTRACT.—Growing Timber.—Statute of Frauds.—Damages.—Contracts for the sale of growing timber are within the statute of frauds, and to be binding must be in writing. But where A., for a consideration received, agrees without writing to pay B. \$100 in growing timber to be cut from A.'s land, but refuses to permit the timber to be cut, B. has his action, and the sum named is the measure of his recovery.

From the Randolph Circuit Court.

W. A. Thompson, A. O. Marsh and J. W. Thompson, for appellant.

T. F. Colgrove, — *Cheney and E. L. Watson*, for appellee.

WOODS, J.—Action by the appellee against the appellant, commenced before a justice of the peace and resulting, on appeal to the circuit court, in a verdict and judgment for the plaintiff. The complaint is in two paragraphs, and the answers of the jury to special interrogatories show that they found a certain amount due the plaintiff upon each paragraph, and that from the total sum due the plaintiff they deducted an amount found due the appellant upon his set-off, and gave a general verdict for the remainder for the plaintiff.

The appellant moved in arrest of judgment, and has assigned as error the overruling of that motion, and also that the complaint does not state facts sufficient to constitute a cause of action. It is not claimed, however, that the second paragraph of the complaint is in any respect defective; and it is well settled that if one of two or more paragraphs of a complaint is good, and there is a general verdict for the plaintiff, a motion to arrest the judgment will not be sustained, and no question can be raised on appeal as to the sufficiency

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of one of the paragraphs, by an assignment either that the entire complaint, or the particular paragraph, does not state facts sufficient. *Higgins v. Kendall*, 73 Ind. 522.

Especially must this be so where the record shows affirmatively, as it does in this instance, that the verdict rests in part, at least, upon the unquestioned paragraph. If it appeared affirmatively that the verdict was based entirely upon the disputed paragraph, it may be that a motion in arrest would present the question; but in this case, as the record stands, it would seem that the proper means of presenting the question to the circuit court was a motion to limit the amount of the plaintiff's demand to the sum found due on his second paragraph, and deducting that sum from the amount found due the appellant upon his set-off, to give judgment for the appellant for the remainder. No such motion, however, was made, and consequently the question is not before us.

It is claimed that errors were committed in admitting testimony and in giving and refusing instructions under and in reference to the cause of action set forth in the first paragraph of the complaint. The record does not purport to contain all the evidence, and it is therefore doubtful whether strictly any of the questions discussed are presented for decision. The main point in dispute, however, we will consider.

The substance of the first paragraph of the complaint is, that the appellee undertook with the appellant to purchase a certain farm, which should be divided between them in a manner and upon terms agreed upon, and in consideration of the premises the appellant promised to pay the appellee the sum of \$100, to be paid in timber delivered on the farm of the appellant, suitable for rails, and at such price as the timber should be reasonably worth; that the plaintiff purchased the farm and caused it to be conveyed, a part to himself and a part to the defendant, in all respects according to the contract, but the defendant had failed and refused to deliver the timber or to permit the plaintiff to take it. Wherefore, etc.

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There was, it seems, some evidence tending to show that the timber contracted for was growing upon the land of the appellant; and it being claimed that the alleged contract was therefore within the statute of frauds, the court gave the following instruction, to the last part of which the appellant excepted:

"6th. * * * And if you believe from the evidence that on the division of the land the defendant agreed to pay to the plaintiff \$100 in timber then growing on the land of the defendant, that the plaintiff was to have the right to enter upon the defendant's land and cut and remove the timber, this, so far as the timber was concerned, was a contract for an interest in real estate, or land, and to be binding must have been in writing, and if there was no writing in regard to the timber, the plaintiff could not recover damages for a breach of contract. The defendant had a right at any time before the contract was executed to revoke the license to enter upon his land and cut and remove the timber. But if the defendant was indebted to the plaintiff in the sum of \$100 in the division of the land, which he agreed to pay in timber from his land, notwithstanding he was not liable in damages for refusing to suffer the plaintiff to take the timber, yet he is not discharged from the payment of his debt. The plaintiff has a right to recover the hundred dollars due him on the contract of division of the land."

Counsel say: "What we insist upon is that when a contract is within the statute of frauds, a party can not recover in a suit *on the contract*, even though it has been fully executed on his part. He must resort to some other form of action. His remedy is on the *quantum meruit*, or some other appropriate form of action, according to the facts of the case."

There is nothing in this. Forms of action were abolished by the code. The complaint need only state the facts upon which relief is claimed, and whatever relief is appropriate may be adjudged. Whether in this case the facts were stated with sufficient fulness to show a complete cause of action, as

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we have seen, is a question which the record does not present. Enough, however, is stated to show the nature of the claim, and to identify the transaction out of which it arose, and consequently enough to bar another suit for the same cause.

The only question, therefore, to be decided is, in the language of counsel: "Did the court, in his instructions to the jury, lay down the correct rule as to the measure of damages in the case?"

Counsel insist that "the contract can not be treated as a nullity for one purpose and as a contract for another purpose," and that, therefore, the value of the timber could not be made the measure of the plaintiff's recovery. To this proposition numerous authorities are cited. Deciding nothing upon the point, it may be conceded to be true, as a general rule, that contracts within the statute can not be made the basis of a claim for special damages against the party who pleads the statute, and that the value of the property, which was the subject of the contract, can not be made the measure of damages or recovery in an action by the other party who had paid the consideration or performed his side of the contract. See *Arnold v. Stephenson*, *ante*, p. 126.

The case before us, however, is manifestly outside of the rule. The appellant's promise was to pay the appellee \$100 in timber, at its fair or reasonable value. The consideration of this promise he received, but the timber he refused to deliver, and claims that he was not bound to deliver it, because it was growing timber on his own land, and the contract not in writing; but, if he does not choose to deliver the timber, he is nevertheless bound to pay the \$100, and, since he refuses to pay it in timber, he is bound to pay it in money. That the appellant is entitled to \$100 in value, is settled by the contract, and in this respect the contract is binding, though it be not binding as to the article in which the payment was to be made. If the agreement had been that the plaintiff should have certain designated growing trees, or the growing timber on a certain body of land, and the action was to recover the value

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of the timber, the doctrine contended for would probably be applicable, but such a case would be entirely distinguishable from the one before us.

Judgment affirmed, with costs.

No. 8765.

MORRISON v. WASSON, TREASURER, ET AL.

TAXES.—Injunction.—Contract.—A proper construction of the stipulation, "taxes of 1875 to be paid by owners respectively," contained in a proposition made by L. to M., on the 25th day of March, 1875, to exchange a city block for bank stock, which proposition was accepted, imposed the duty upon M. to pay the taxes for 1875 upon the bank stock and precluded him from enjoining their collection.

From the Marion Superior Court.

S. Claypool, H. C. Newcomb and W. A. Ketcham, for appellant.
J. A. Henry, for appellees.

BEST, C.—This action was brought by the appellant against William Wiles, treasurer of the city of Indianapolis, and the other appellees, to enjoin the treasurer from collecting the taxes assessed for the year 1875, upon 160 shares of \$100 each, of the stock in the Merchants' National Bank, of Indianapolis, Indiana, of the appellant.

The facts averred in the complaint are, in substance, these: That the appellant was the owner of the stock in question on the 26th day of March, 1875, and on that day he sold the same, with some real estate, to Lewis Shively, one of the appellees, in pursuance of a written agreement, a copy of which is filed, and made a part of the complaint; that on said day all the property mentioned in said agreement was transferred except said stock, which, at the request of said Shively, was not transferred upon the books of the bank until the 6th day of April thereafter; that the officers of said bank, after the

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transfer of said stock, with full knowledge that Shively was the equitable owner of said stock on and after the 26th day of March previous, made out a list of the stockholders of said bank, showing that the appellant owned said stock on the 1st day of April, and delivered the same to the auditor of Marion county, Indiana, as required by section 64 of the act for the assessment of taxes; that afterward said auditor delivered a copy of said statement to the mayor of the city of Indianapolis, as required by law, and appellant was, by the proper officers of said city, assessed \$240 as taxes upon said stock; that at the times when said statement was made and said copy delivered, the appellant was ignorant that any statement had been made, and that the officers of said bank neglected to inform the officers of said city that the appellant was not the owner of said stock; that after the 6th of April said stock was transferred from person to person, and was then owned by the appellees Pratt, Farley and Malott; that Shively has since become and remains wholly insolvent, and unless the treasurer is enjoined from collecting said taxes from the appellant, he is without remedy. Prayer, that the treasurer of the city be enjoined, and, if not, that the appellant be subrogated to the right of the city against the bank and Shively.

The contract was as follows:

“INDIANAPOLIS, March 25th, 1875.

“I will sell my block on Alabama and Massachusetts avenue on the following terms, to wit:

Bank stock at its value	\$20,000
Cash in hand	10,000
Note one year at six per cent	6,800
Incumbrances assumed, seven per cent	18,200
Thirty lots in Morrison & Talbott's addition	30,000
Thirty-two average lots in Murphey S. E. addition	16,000

—————
\$101,000

“I transfer insurance, \$15,000, without expense to the purchaser; taxes of 1875 to be paid by owners respectively;

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possession given April 1st, 1875; the semi-annual dividend due May 1st, 1875, to be divided equally.

"LEWIS SHIVELY."

"I accept the above terms.

"W. H. MORRISON."

A demurrer for want of facts was sustained to the complaint, and this ruling presents the only question in the record. After this appeal was taken, but before the submission of the cause, the death of William Wiles was suggested and the present treasurer of the city of Indianapolis, William G. Wasson, was substituted.

The appellees insist that by the terms of the contract the appellant bound himself to pay these taxes, and if such is the fact the ruling was right. This fact depends upon the proper construction of the following stipulation: "Taxes of 1875 to be paid by owners respectively." The appellant insists that this stipulation means that each party was to pay the taxes of 1875 upon the property he was to receive, and not upon the property he was selling. We do not concur in this view. Each owned some of the property and each was to pay the taxes of 1875 upon his property. What property? The property then owned by him, or the property to be acquired by him? Manifestly the former. The term "owner" implies a present proprietor and not one who may hereafter acquire property. The term "property" is understood in the above stipulation, and it is read as though it were written "taxes of 1875 to be paid by owners of property respectively." Owners of what property? Of that mentioned in the contract and owned by each when the stipulation was made. The language is found in a proposition made by Shively to the appellant for an exchange of property, and it must apply to the property owned by each at the time the proposition was made. At that time appellant owned the stock, and the stipulation, in our opinion, was equivalent to a proposition upon the part of Shively, that he would pay the taxes upon his block, and that appellant should pay upon

Morrison v. Wasson, Treasurer, et al.

his block. The language itself does not imply that each was to pay upon property to be owned, but to property then owned, and, as appellant then owned the stock, we think the stipulation obligated him to pay the taxes. Again, every stipulation should be construed so as to render it effective. By the terms of the contract the property was to be transferred at once, and, had it been, the law would have imposed the duty upon Shively, in the absence of an agreement to the contrary, to pay the taxes of 1875 upon the property he received by the transfer, and a like duty upon the appellant. By statute, the taxes of 1875 did not become a lien until the 1st day of April, and by the contract each would not have owned the property he was transferring at that time, and would not have been liable for the taxes thereon, without an agreement to pay them.

If it was intended that each should pay the taxes upon the property he was transferring, it was necessary to stipulate for their payment; but, if it was not so intended, no stipulation whatever was necessary, as the law would not have imposed any such obligation upon him. If, on the other hand, it was intended that each was to pay upon the property he was receiving, no stipulation was necessary, as the law would have imposed such obligation without an agreement. Unless the stipulation means that each is to pay the taxes upon the property he is transferring, it imposes no obligation that the law would not have imposed in its absence, and is really without meaning. We think it was intended and must be construed to impose an obligation upon the appellant that the law did not impose, and that it bound him to pay the taxes in question. It being his duty to pay the taxes, of course he can not enjoin their collection. For these reasons we think the demurrer to the complaint was properly sustained, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the costs of appellant.

Nowlin v. Whipple.

No. 8975.

79	481
146	253

NOWLIN v. WHIPPLE.

EASEMENT.—*Private Way.*—*Parol Grant.*—A parol grant of a private way, upon a valuable consideration, where the grant is followed by the grantee's occupation and use of the way for sixteen years, can not be revoked by the grantor or by one claiming under him, upon the ground that the grant rested in parol, or that the way had not been marked out or designated in writing.

PRACTICE.—*Uncertainty in Pleading.*—Uncertainty in the allegations of a pleading can not be reached by a demurrer for the want of facts, but only by motion to make more specific.

SAME.—*Prayer for Relief.*—*Demurrer.*—A complaint will not be held bad on demurrer for the want of facts, if the facts stated show that the plaintiff is entitled to some relief, though it may be different from the relief demanded. A prayer for relief is not the subject of demurrer.

From the Dearborn Circuit Court.

F. Adkinson and *G. M. Roberts*, for appellant.

O. B. Liddell and *W. H. Dowdell*, for appellee.

Howk, J.—The only question presented for decision in this case is this: Did the circuit court err in overruling the appellant's demurrer to appellee's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action?

In his complaint the appellee alleged, in substance, that he was the owner of a certain tract of land, particularly described, in Dearborn county, containing eleven and one-half acres; that the appellant was the owner of a certain other tract of land, particularly described, in said county, containing seventy-two acres; that appellee's said tract of land was set off to him, as one of the parties in a certain suit for partition, wherein Ann M. Case and others were plaintiffs and Jeremiah Nowlin was defendant, in the court of common pleas of Dearborn county, commenced on the 18th day of January, 1862, as would be seen by reference to the records of said cause then in said court; that the appellant's said tract of land was, in

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of one of the paragraphs, by an assignment either that the entire complaint, or the particular paragraph, does not state facts sufficient. *Higgins v. Kendall*, 73 Ind. 522.

Especially must this be so where the record shows affirmatively, as it does in this instance, that the verdict rests in part, at least, upon the unquestioned paragraph. If it appeared affirmatively that the verdict was based entirely upon the disputed paragraph, it may be that a motion in arrest would present the question; but in this case, as the record stands, it would seem that the proper means of presenting the question to the circuit court was a motion to limit the amount of the plaintiff's demand to the sum found due on his second paragraph, and deducting that sum from the amount found due the appellant upon his set-off, to give judgment for the appellant for the remainder. No such motion, however, was made, and consequently the question is not before us.

It is claimed that errors were committed in admitting testimony and in giving and refusing instructions under and in reference to the cause of action set forth in the first paragraph of the complaint. The record does not purport to contain all the evidence, and it is therefore doubtful whether strictly any of the questions discussed are presented for decision. The main point in dispute, however, we will consider.

The substance of the first paragraph of the complaint is, that the appellee undertook with the appellant to purchase a certain farm, which should be divided between them in a manner and upon terms agreed upon, and in consideration of the premises the appellant promised to pay the appellee the sum of \$100, to be paid in timber delivered on the farm of the appellant, suitable for rails, and at such price as the timber should be reasonably worth; that the plaintiff purchased the farm and caused it to be conveyed, a part to himself and a part to the defendant, in all respects according to the contract, but the defendant had failed and refused to deliver the timber or to permit the plaintiff to take it. Wherefore, etc.

Terrell v. Frazier.

There was, it seems, some evidence tending to show that the timber contracted for was growing upon the land of the appellant; and it being claimed that the alleged contract was therefore within the statute of frauds, the court gave the following instruction, to the last part of which the appellant excepted:

"6th. * * * And if you believe from the evidence that on the division of the land the defendant agreed to pay to the plaintiff \$100 in timber then growing on the land of the defendant, that the plaintiff was to have the right to enter upon the defendant's land and cut and remove the timber, this, so far as the timber was concerned, was a contract for an interest in real estate, or land, and to be binding must have been in writing, and if there was no writing in regard to the timber, the plaintiff could not recover damages for a breach of contract. The defendant had a right at any time before the contract was executed to revoke the license to enter upon his land and cut and remove the timber. But if the defendant was indebted to the plaintiff in the sum of \$100 in the division of the land, which he agreed to pay in timber from his land, notwithstanding he was not liable in damages for refusing to suffer the plaintiff to take the timber, yet he is not discharged from the payment of his debt. The plaintiff has a right to recover the hundred dollars due him on the contract of division of the land."

Counsel say: "What we insist upon is that when a contract is within the statute of frauds, a party can not recover in a suit *on the contract*, even though it has been fully executed on his part. He must resort to some other form of action. His remedy is on the *quantum meruit*, or some other appropriate form of action, according to the facts of the case."

There is nothing in this. Forms of action were abolished by the code. The complaint need only state the facts upon which relief is claimed, and whatever relief is appropriate may be adjudged. Whether in this case the facts were stated with sufficient fulness to show a complete cause of action, as

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vate way in controversy. It is true, that the complaint contains no such allegation, and, if it were necessary that it should allege such fact, then it must be conceded, that the complaint was bad. But we do not think that such allegation was necessary to the sufficiency of the complaint. It was alleged in the complaint, that the appellant's ancestor, under whom he held title, had given the appellee a private way over certain real estate, upon certain valuable considerations, and that the appellee had entered upon and used such private way for sixteen years, without objection or hindrance of the appellant or his ancestor. Even if the grant of such private way had rested wholly in parol, the appellee's entry upon and user of such way for so many years would so mark and designate the same as to prevent the appellant from revoking the license therefor and obstructing the way, upon the ground merely that the license or grant was a verbal one. Thus, in *Hodgson v. Jeffries*, 52 Ind. 334, it was held by this court, in substance, that a license by the owner of land to the owner of adjoining land, to construct and use perpetually a ditch over the former's land, for the purpose of draining the latter's land, might be verbal, and that, upon the construction and continued use of the ditch, such license would be irrevocable by the former's grantee, though unforeseen injuries might result to the former or his grantee, from the construction and use of such ditch. Upon the point under consideration, in the case at bar, we can see no difference in principle between a license for a private ditch and a license for a private way. The appellant's first objection to the complaint, therefore, is not well taken. Washb. on Easements, pp. 8 to 39.

The next objection to the complaint is, that its allegations as to the private way are indefinite and uncertain. This objection, if it existed, was not reached by the demurrer to the complaint. Such an objection can only be reached by a motion to make more certain and specific. *The Pennsylvania Co. v. Sedwick*, 59 Ind. 336.

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The only other objection urged to the complaint is, that it does not show such irreparable injuries to the appellee, as would entitle him to a perpetual injunction. As the question is presented here, it is immaterial perhaps, whether the complaint stated a case for an injunction or not, as it certainly showed such a trespass as entitled the appellee to damages, and in such a case the demurrer to the complaint was correctly overruled, whether the appellee was or was not entitled to all the relief demanded. As a general rule, it may be said with certainty, we think, that a complaint will not be held bad on a demurrer thereto for the want of facts, merely because wrong relief or greater relief than the plaintiff is entitled to may have been demanded. Objections to the prayer for relief can not be reached by a demurrer to the complaint for the want of sufficient facts. *Mark v. Murphy*, 76 Ind. 534.

In the case at bar, the complaint showed by the facts alleged, if sustained by the evidence, a proper case for a perpetual injunction.

The demurrer to the complaint was correctly overruled.

The judgment is affirmed, at the appellant's costs.

No. 7433.

DAWSON v. WILSON ET AL.

79	485
158	860

SUPREME COURT.—Practice.—Co-Defendant.—One defendant can not complain, in the Supreme Court, that the name of a co-defendant was stricken from the record by the court below, unless it appears that he was prejudiced thereby.

SAME.—Cross Complaint.—That a cross complaint was stricken from the record by the court below can not be questioned in the Supreme Court, unless the record shows the ground upon which the court below acted.

From the Warren Circuit Court.

R. C. Gregory and *W. B. Gregory*, for appellant.

J. M. Rabb, for appellees.

Dawson v. Wilson et al.

WORDEN, J.—This case has been in this court before, in a little different form, and the decision of it is reported in 52 Ind. 513 (*Wilson et al. v. Dawson et al.*). The original action was brought by Wilson and others to reform and foreclose a mortgage. The appellant herein, Charles J. Dawson, and Zimri Atkinson, Joseph Atkinson, Robert M. Atkinson, Cephas Atkinson and Wesley Wagner were, among other persons, made defendants. The only supposed errors complained of by the appellant are shown by the following bills of exception:

1. "Be it remembered, that heretofore, to wit, at the present term of this court, the defendants, Zimri Atkinson, Joseph Atkinson, Cephas Atkinson, Robert M. Atkinson and Wesley Wagner, by their attorneys, Joseph M. Rabb and James McCabe, moved the court to strike the names of said defendants from the record. And that after argument the court, on the 18th day of June, 1877, sustained said motion and struck the names of said defendants from the cause, and to the ruling of the court in sustaining said motion the defendant Charles J. Dawson then and there excepted, and time was given to file exceptions," etc.

2. "Be it remembered, that on the seventh juridical day of the June term of said court for 1877, the defendants Zimri Atkinson, Joseph Atkinson, Cephas Atkinson, Robert M. Atkinson and Wesley Wagner moved the court to strike from the files of this cause the cross complaint of the defendant Charles J. Dawson filed herein on the 3d day of April, 1877, which reads in the words and figures following, to wit" (here the cross complaint is set out), "and which said motion reads as follows, to wit (not on file with the papers in the cause), and, after argument of said motion, the court then and there sustained the same, and struck from the files of said cause said cross complaint, and to the sustaining of said motion the defendant Charles J. Dawson then and there excepted, and time was given to file his bill of exceptions," etc.

The first bill of exceptions does not show the ground on which the names of Zimri Atkinson and the other persons

Dawson v. Wilson *et al.*

named were struck from the record. If one defendant can in any case object to the striking out of the name of another, it should in some way appear that he was injured by it before he can complain of it as error, whatever may have been the ground on which it was struck out. In looking through the record we can not discover from the relations of the parties to the case, that the appellant was in any way injured by striking out the names of the persons mentioned as defendants to the original action. The appellant was only interested in keeping them in court as parties to his cross complaint.

This is the view of counsel for the appellant, for in their brief they say: "The question presented by this record arises on the allegations contained in the cross complaint of Charles J. Dawson against the appellees, set out in the assignment of error."

We conclude, therefore, that no error was committed against the appellant in striking out the names of the persons mentioned as parties to the action.

The next question is, did the court err in striking out the appellant's cross complaint? We can by no means say that there was any error in this ruling. The second bill of exceptions does not show the ground upon which the motion to strike out was made or sustained. There may have been good ground for sustaining the motion, and we must presume that such ground existed, in the absence of any showing of the ground upon which the court acted.

Thus, in the case of *Ross v. Misner*, 3 Blackf. 362, a cause had been dismissed in the circuit court, on motion, no reason appearing for or against the dismissal, and it was held that the dismissal must be presumed to have been correct.

Again, in the case of *The Inhabitants of Congressional Township, etc., v. Clark*, 1 Ind. 139, a cause was dismissed on motion of the defendant, the bill of exceptions not showing the ground of the motion. Held that the presumption was that the cause was dismissed on sufficient ground. In *Conoway v. Weaver*, 1 Ind. 263, the same thing was held, and in

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addition thereto it was held that the statements of the clerk as to the ground of the motion could not be taken as showing the ground. See, also, as to the necessity of the ground of dismissal being shown, the cases of *Aspinwall v. The Board of Commissioners of Knox County*, 18 Ind. 372, and *Burntrager v. McDonald*, 34 Ind. 277.

The judgment below is affirmed, with costs.

79 488
168 590

No. 10,017.

KURZ v. THE STATE.

CRIMINAL LAW.—*Intoxicating Liquor.*—*Gift to Minor.*—*Evidence.*—Where the indictment charges that the defendant unlawfully gave to a person, under the age of twenty-one years, intoxicating liquor, evidence tending to prove a sale of such liquor, or from which such sale might be inferred, will not authorize the defendant's conviction of the offence charged.

SAME.—*Evidence.*—In such a case, where the subject of the gift or sale is shown to be beer, it devolves upon the State to prove further, that the beer was either a malt liquor, or was, in fact, intoxicating; otherwise the evidence will not be sufficient to warrant a conviction.

From the Clark Circuit Court.

P. H. Jewett and *C. L. Jewett*, for appellant.

D. P. Baldwin, Attorney General, *L. B. Burke*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

Howk, J.—In this case the indictment charged, "that on the 15th day of October, 1881, at said county, Richard Kurz did then and there unlawfully sell, barter and give away to John Rauchenberger, Jr., a minor under the age of twenty-one years, intoxicating, spirituous, vinous and malt liquors." On the appellant's motion, the court quashed so much of the indictment as attempted to charge a sale and barter of intoxicating liquors. On arraignment and a plea of not guilty, the

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cause was tried by the court and a finding was made that the appellant was guilty as charged in the indictment and assessing his punishment at a fine in the sum of \$20. Over his motion for a new trial, and his exception saved, the court rendered judgment on its finding; and from this judgment this appeal is prosecuted.

The only error assigned by the appellant, in this court, is the decision of the circuit court in overruling his motion for a new trial. In this motion the only causes assigned for such new trial were, that the finding of the court was contrary to law, and that it was not sustained by the evidence. It will be observed that the sufficiency of the indictment is not questioned in this court, and, therefore, it is not considered or passed upon.

The evidence on the trial consisted entirely of the testimony of John Rauchenberger, Jr., the minor named in the indictment. His testimony is short, and we give it in full as it appears in the bill of exceptions, as follows: "My name is John Rauchenberger, Jr. I am twenty years old. I am a minor. I know the defendant, Richard Kurz. I was in his saloon on Spring street, in the city of Jeffersonville, Clark county, Indiana, on the 8th day of October, 1881. I drank a glass of beer there. Ed. Winters walked up to the counter and called for two glasses of beer and paid for them. They were placed on the counter by Kurz, and I drank one of them." This was all the evidence given in the cause, and, upon this evidence, the court found the appellant guilty and assessed his fine, etc.

The indictment charged the appellant with the offence, which is defined and its punishment prescribed, in section 187 of the act of April 14th, 1881, concerning public offences, etc., being section 2094, R. S. 1881. This section provides as follows: "Whoever, directly or indirectly, sells, barter, or gives away any spirituous, vinous, malt, or other intoxicating liquors to any person under the age of twenty-one years shall be fined in any sum not more than one hundred dollars nor less than twenty dollars."

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The charge in the indictment, after a part of it had been quashed, was, that the appellant gave away to John Rauchenberger, Jr., a minor under the age of twenty-one years, "intoxicating, spirituous, vinous and malt liquors." The question for decision is this: Does the evidence of John Rauchenberger, Jr., set out in full in this opinion, show that the appellant gave away to him any of the liquors named in the indictment? We are of the opinion that this question must be answered in the negative. In section 249 of the criminal code of 1881 (section 1824, R. S. 1881), it is provided, that "A defendant is presumed to be innocent until the contrary is proved. When there is a reasonable doubt whether his guilt be satisfactorily shown, he must be acquitted." It seems to us that the evidence wholly fails to show the appellant's guilt of the charge in the indictment. It utterly fails to show any gift by the appellant to John Rauchenberger, Jr., and it entirely fails to show a gift of any of the liquors named in the indictment, or in the section of the statute defining the offence. It does not show that the beer, mentioned by the witness, was a malt liquor or that it was an intoxicating liquor. In *Weis v. The State*, 33 Ind. 204, it was said: "*Beer* may be, but is not necessarily, a malt liquor, and may not be intoxicating. It devolves on the State, therefore, to prove that the beer sold was either a malt liquor or that it was, in fact, intoxicating liquor. Neither of these facts could be assumed or judicially recognized. As no such proof was made, the evidence was not sufficient to warrant a conviction." To the same effect, substantially, are the following cases: *Klare v. The State*, 43 Ind. 483; *Lathrope v. The State*, 50 Ind. 555; *Schlosser v. The State, ex rel.*, 55 Ind. 82.

Not only does the evidence fail to show any gift by the appellant to the minor, of the beer, but, as we read the evidence, it shows an absolute sale of the beer by the appellant to Ed Winters, who paid for the same. Surely, it can not be inferred from this evidence, that, after his sale of the beer to Winters, he gave away the same beer to the minor, Rauchenberger.

Cummins v. The City of Seymour.

Our conclusion is, that the finding of the court was not sustained by the evidence, and that, for this cause, the appellant's motion for a new trial ought to have been granted.

The judgment is reversed, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

No. 9027.

CUMMINS v. THE CITY OF SEYMOUR.

CITY.—Highway Outside Boundaries.—Drainage.—Damages.—Consequential Injuries.—A municipal corporation has authority to use a public way lying outside of its boundaries, for the purpose of drainage, without paying or tendering damages to adjacent property owners, and for consequential injuries resulting from the proper and reasonable exercise of such authority there can be no recovery.

SAME.—Street Improvements, Authority to Make.—A municipal corporation is not bound to let all public work to contractors; but sewers, bridges and the like may be built by the officers of the city, if the governing corporate officers deem it expedient. *City of Delphi v. Evans*, 36 Ind. 90, explained.

SAME.—Care, Diligence and Skill.—Where municipal improvements are made with ordinary care, diligence and skill, the corporation is not responsible for injuries resulting to adjacent property.

SAME.—Duty of Officers.—Presumption.—Until the contrary appears, the officers of a public corporation are presumed to have done their duty.

PLEADING.—Material Facts.—Material facts essential to the existence of a cause of action should be positively alleged, and not left to be gathered by mere conjecture, nor should they be stated by way of recital.

SAME.—Obstruction of Highway.—That the obstruction of a highway, complained of by an abutter, is permanent, is a fact material to his cause of action.

SAME.—Defect in Plan.—A municipal corporation is liable for injury resulting from a negligent error in the plan of a drain or sewer.

From the Jackson Circuit Court.

W. K. Marshall, for appellant.

F. T. Hord and *W. B. Hord*, for appellee.

79	491
134	579
79	491
131	285
181	378
181	561
79	491
137	432
138	316
79	491
140	114
141	612
79	491
147	521
79	491
148	368
149	672
79	491
153	343
79	491
158	222
158	241
79	491
162	173
79	491
171	555

Cummins v. The City of Seymour.

ELLIOTT, C. J.—Lands lying near but outside of the corporate limits of the city of Seymour were laid off into lots, and streets and highways provided for. After the lots had been laid off and a plat made, appellant became the purchaser of one of the lots abutting upon a public way extending into the city of Seymour; improvements were made by him on his lot, and a fence constructed along the line of the public way. Sometime afterwards the municipal authorities caused a wide ditch to be dug along the side of the way and did this without having tendered the appellant any compensation. In constructing this ditch large quantities of earth were thrown out upon the highway, and by this act the corporation obstructed the way and destroyed the grade. The ditch receives the waters of a stagnant pond and conducts them past the appellant's property, and also receives and carries off noisome fluids from the gutters and drains of the city, and from the drains of a woollen mill situated within the corporate limits. Noxious and unwholesome smells arise from the fluids collected in the ditch and spread over the appellant's land and house, rendering his house unhealthy and making it impossible for him to rent his property. Before the construction of the ditch no noisome fluids flowed by appellant's land, and from that annoyance it was entirely free. The natural flowage of the drainage of the city of Seymour, and of the waters of the stagnant pond, was changed by the construction of the ditch, and the drainage of the city and the waters from the pond made to flow by the appellant's land. We have omitted the epithets and merely formal statements of the appellant's complaint, but have given in the foregoing synopsis the material facts which it contains. A demurrer was sustained to the complaint, and this appeal requires us to decide whether this ruling was right or wrong.

We agree with appellee's counsel that the general rule is, that a municipal corporation is not responsible for the negligence of an independent contractor. *Ryan v. Curran*, 64 Ind. 345; 2 Dill. Munic. Corp., 3d ed., secs. 1028, 1029. But this

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rule furnishes the appellee no assistance in the assault upon the complaint. The allegation is that the acts complained of were done by the officers and servants of the corporation.

It is well settled that the doctrine of *respondeat superior* applies as well to public as private corporations. The difficulty of determining who are officers and servants is much greater in the one case than in the other, but there is no doubt at all as to the applicability of the rule to municipal corporations. The confessed allegations of the complaint make it clear that the relation of principal and agent and of master and servant existed between the appellee and those employed in opening the ditch.

A municipal corporation is not bound to let all public work to contractors. There is no such a requirement in the general act for the incorporation of cities. Sewers, bridges, and the like, may be built by the officers of the city, if the governing corporate officers deem it expedient. There are many provisions in the general act conferring full authority upon cities to do such work through their own officers and servants. As shown in *City of Aurora v. Fox*, 78 Ind. 1, the expressions in *The City of Delphi v. Evans*, 36 Ind. 90, indicating that all public work must be let to contractors, are not correct statements of the law, and did not constitute any part of the decision of the court. It is very evident that the judge did not concur in the views upon this subject of the judge by whom that opinion was prepared. It can not be correctly held that the appellee could not have done the work described in the complaint through its own officers and servants. The power to so perform the work the corporation unquestionably possessed, and the complaint explicitly avers that it was done by the corporate officers, agents and servants.

We yield full assent to the doctrine, that consequential injuries resulting from the construction of municipal improvements in the streets of the city, such as drains and sewers, are not within the provisions of the constitution prohibiting the taking of private property for public use without compensa-

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tion first paid or tendered. We fully approve the rule, that where municipal improvements are made with ordinary care and skill, the corporation is not responsible for injury resulting to adjacent property. *Weis v. The City of Madison*, 75 Ind. 241; *Macy v. The City of Indianapolis*, 17 Ind. 267; *The City of Lafayette v. Bush*, 19 Ind. 326.

For an error in the exercise of a legislative power, a municipal corporation is not liable; nor is it liable for failure to undertake public improvements unless such improvements are made necessary by some act of its own. *Stackhouse v. The City of Lafayette*, 26 Ind. 17; *The City of Logansport v. Wright*, 25 Ind. 512; *Roll v. The City of Indianapolis*, 52 Ind. 547. Where, however, ministerial acts are undertaken, the corporation is bound to the exercise of reasonable skill and ordinary care. For a failure to exercise such skill and care, the corporation is liable to one who suffers injury because of the negligent omission to use the requisite degree of care and skill.

It has been a much debated point whether a municipal corporation is liable for a negligent error in the plan of a drain or sewer. It is conceded on all sides, that there is liability where there is want of skill or care in the mechanism; but there are very many cases holding that there is none where the defect is in the plan. As shown in *Weis v. The City of Madison*, *supra*, our cases have uniformly held that the corporation is liable for a negligent error in the plan. *The City of Indianapolis v. Huffer*, 30 Ind. 235; *The City of Indianapolis v. Lawyer*, 38 Ind. 348; *The City of Indianapolis v. Tate*, 39 Ind. 282. The opinion expressed by Judge Dillon, in the last edition of his work, is in harmony with the decisions of this court, as is fully evidenced by the extract quoted in *Weis v. The City of Madison*, *supra*. We are not disposed to depart from the rule which has so long prevailed in this State. We are satisfied that it is a sound and salutary one, and we know that it is growing in favor with the text-writers and the courts. A slight change in the facts of the

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case in hand would make it a striking illustration of the wisdom of the rule. Let it be added to the facts stated, that the ditch is to be a permanent one, occupying ten feet of the way, with banks on each side four or five feet high and as many broad, thus occupying the entire way, and rendering it unsuitable for travel. If the facts supplied by our supposition were all in the complaint, we think the plainest principles of justice would require that relief be granted adjoining proprietors. One would think that the property owner was quite as seriously injured by the lack of skill in devising the plan as he could possibly be by any want of care or skill in the performance of the work. Whether the unskilfulness of the plan or the negligent manner of executing it destroyed the highway the injury would be the same. The true rule, reasonable in itself and just in its results, is, that the skill and care must extend both to the plan and its execution. The appellee's contention that an action will not lie where the only want of skill is in devising the plan can not prevail.

A municipal corporation, having authority to construct a drain or sewer in a public street, must necessarily be allowed a reasonable time in which to do the work, and must also be allowed to obstruct the street for a reasonable length of time, although inconvenience and injury may result to citizens and property. Having a right to do the work, the corporation must have all the incidental powers necessary to effectuate the principal power. But, in performing the work, the corporation acts ministerially and must proceed with ordinary diligence, skill and care. The work must be prosecuted with reasonable diligence, for the corporation has no right to obstruct the public highways for an unreasonable length of time. The diligence required is not confined merely to the skill and care required to do the work properly and make it safe, but it also extends to the time within which it must be done. The complaint before us does not show that the corporation is not prosecuting the work with reasonable diligence. It does not show that the obstruction of the highway

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is intended to be a permanent one. For anything that appears reasonable diligence was exercised. There is nothing to show that the corporation does not intend to make the public way safe and convenient for travel. It may well be inferred that the corporation will complete the drain in a proper manner, and leave the highway in good condition. It does not even appear that the ditch is a permanent one or that it is to be kept open. It can not be presumed for the purpose of making out a cause of action in favor of appellant, that the corporate officers will violate the law and perpetrate a wrong. The presumption is the reverse. Until the contrary appears the officers of a public corporation are presumed to have done their duty. *Sims v. The City of Frankfort*, ante, p. 446.

Material facts essential to the existence of a cause of action should be positively alleged. They should not be left to be gathered by mere conjecture, nor should they be stated by way of recital. *Jackson School Tp. v. Farlow*, 75 Ind. 118.

The appellant contends that the municipal authorities have no power to put ditches or drains in highways outside of the city limits, and that it is, therefore, not necessary for the complaint to show that there was lack of diligence, skill or care in the performance of the work. If appellant is right in his assumption that the corporate officers had no power to construct the drain outside of the city limits, his case is at an end, for he can not maintain an action against the municipality. This doctrine is thus expressed in *Smith v. The City of Rochester*, 76 N. Y. 506: "The doctrine is well settled, that municipal corporations are within the operation of the general rule of law, that the superior or employer must answer civilly for the negligence or want of skill of an agent or servant in the course of their employment, by which another is injured. It is essential, however, to establish such a liability that the act complained of must be within the scope of the corporate powers, as provided by charter or positive enactment of law. If the act done is committed outside of the authority and

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power of the corporation as conferred by statute, the corporation is not liable, whether its officers directed its performance, or it was done without any express direction or command." The leading American case upon this subject is that of *The Mayor, etc., v. Cunliff*, 2 N. Y. 165, and this court has in many cases given its approval to the rule there declared. In *Browning v. The Board, etc.*, 44 Ind. 11, the court cited with approval the case named and many others, and declared that the officers of a corporation are the mere agents, and, where they transcend the boundaries prescribed for them, the corporation is no more bound by their acts than any individual by the unauthorized act of his agent. In the earlier case of *Johnson v. Common Council, etc.*, 16 Ind. 227, the same general principle was recognized and enforced. In the later case of *Haag v. The Board, etc.*, 60 Ind. 511, the doctrine of *Browning v. The Board, etc.*, is approved and the statement of the rule made by Judge Dillon is recognized as a correct enunciation of the law. In the latest case upon this subject, that of *The Driftwood V. T. Co. v. The Board, etc.*, 72 Ind. 226, the principle stated found full and forcible recognition, all the more forcible because of the sharply defined distinction there made between officers of public corporations and agents of private ones. If appellant's proposition, that the city officers wrongfully went outside of the corporate limits, could be maintained, it would defeat his action; he would, in that event, "be hoist by his own petard." But his proposition can not be sustained.

The municipal officers have power to construct drains in public highways outside of the city limits. It is provided in subdivision 26 of section 53 of the act for the incorporation of cities, that the corporate authorities, "for the purpose of drainage of such city, may go beyond the city limits and condemn lands and materials and exercise full jurisdiction, and all the necessary power therefor." There are other provisions in the act conferring authority upon municipal officers to go beyond

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the corporate limits for the purpose of doing acts essential to the public welfare.

The question next encountered is whether the municipal corporation has a right to use a public way lying outside of its boundaries, for the purposes of drainage, without paying or tendering damages to adjacent property owners. We have already seen that it has been long and firmly settled, that a municipal corporation is not liable for consequential injuries, resulting from improvements made in or upon the streets of the corporation to property abutting upon the streets of the municipality. We are now to inquire whether a different rule obtains where the injury results from the construction of drains in highways which lie outside of the corporate limits.

Highways, whether within or without the limits of a municipal corporation, are subject to legislative control, provided that their character as highways may not be entirely divested. In *The Common Council of Indianapolis v. Croas*, 7 Ind. 9, it was held that an abutter has a private right distinct from that of the public, which the Legislature can not take away. This doctrine has often been approved. *Haynes v. Thomas*, 7 Ind. 38; *Tate v. O. & M. R. R. Co.*, 7 Ind. 479; *Protzman v. Indianapolis, etc., R. R. Co.*, 9 Ind. 467; *State v. Berdetta*, 73 Ind. 185. It is not, however, to be inferred from this doctrine, that public highways may not be used for public purposes other than that of travel, although this is undoubtedly the primary purpose for which highways are established. It may be, and probably is true, that no public use can be authorized which will deprive the way of its character as a public road, which every citizen has a right to use for the purpose of travel. Subordinate to this one great and primary purpose are other uses which may lawfully be made of a highway. An American writer says:

“The power of the public, or of municipal corporations acting in the public behalf, over highways, is not restricted to their use for the mere purpose of transit. It extends to the promotion of the public convenience by the laying of water-

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pipes and gas-pipes in the streets of cities ; and to the promotion of the public health by the construction of drains and sewers, or making any other changes therein. And any injury which results to individuals from such a use of the public streets, unless there be a lack of proper care, is *damnum absque injuria*. Thus, it has been decided that a city has the right to fill up a watercourse, if that be the best means of remedying a nuisance which it occasions, and that the fact, that a riparian proprietor is thereby deprived of his right to pass and repass upon the watercourse from his land to the sea, or is damnified by the noisome smells generated by the stagnation of the water, does not entitle him to damage. Such a proceeding stands on the same footing as quarantine or fire regulations, from which, if the individual receives damage, the law presumes him to be indemnified by sharing their advantages, and holds it to be *damnum absque injuria*. And it makes no difference though the regulations thus made be of such a character as to suspend the enjoyment of the property in the sole mode in which the party plaintiff is entitled to use it." Angell on Highways, section 216.

There are many authorities cited in support of the text, but we do not deem it necessary to approve or disapprove of the extent to which the doctrine is carried by the author, but we do sanction his statements in so far as they declare that many public uses other than that of travel may be made of highways without entitling adjoining proprietors to compensation. Judge Dillon says that the highways of a State are under the paramount and primary control of the Legislature, and that they may be devoted to other public uses than those of travel. 2 Dillon Munic. Corp., sections 656, 688. It is clear upon principle as well as authority, that the Legislature may delegate power to municipal corporations to make use of highways for the purpose of drainage. In such a case the municipality is in some sense the agent of the State. It was said by the Supreme Court of the United States, in *Transportation Co. v. Chicago*, 99 U. S. 635, that "It is undeniable that in making

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the improvements of which the plaintiffs complain" (constructing a tunnel) "the city was the agent of the State, and performing a public duty imposed upon it by the Legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and in this country." Further on in the same opinion, it is said:

"The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the Legislature shall give."

Judge COOLEY maintains the general doctrine, that consequential damages, flowing from the construction of public improvements, will not give a right of action. Cooley's Const. Lim. 676 (4th ed). It must be held upon principle as well as upon authority, that the Legislature may authorize the reasonable use of highways by a municipal corporation for the purposes of drainage, whether such highways are within or without the territorial limits of the corporation. If this be correct, then it must follow that for consequential injuries, resulting from the proper and reasonable exercise of such authority, there can be no recovery, since to hold otherwise would be to declare that for the performance of a lawful act in a lawful manner a public corporation may be treated as a wrong-doer, and as such mulcted in damages. It would violate all principles of logic as well as of law to hold that one who had committed no tortious act, but had done what the law authorized and in the manner prescribed by law, should be held to the same responsibility as are those who are guilty of actionable torts.

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The complaint, as we have seen, is not so framed as to show that the drain is a permanent one, destroying the whole highway for the purposes of travel, and we are not, therefore, called upon to decide whether a highway can be taken and so used for drainage purposes as to cut off all means of ingress and egress to and from abutting lands. Judge COOLEY cites our own and other cases holding that abutters have a private right distinct from the public, of which they can not be deprived without compensation. Const. Limitations, 4th ed., 679, n. 1. It is a very grave question whether the entire destruction of a highway by conversion into an open drain is not such an invasion of private right as to give a complete cause of action. But, as the complaint fails to properly show a permanent occupancy of the way, we regard this question as not fairly in the record.

We have no difficulty in agreeing with appellee's counsel, that one who sustains an injury in common with the public from the obstruction of a highway can not maintain a private action. This rule is as old, at least, as *Fincux v. Hoven-den*, Cro. Eliz. 664, where there was an unlawful obstruction of a public way, and it was held that, "without a special grief shown by the plaintiff, the action lies not, but it is punishable in the leet." Our own court has recognized and enforced this doctrine. *McCowan v. Whitesides*, 31 Ind. 235. But, while this is sound doctrine, it is equally well settled that where one does sustain a special injury, different in character from that sustained by the public, he may have his action. *Ross v. Thompson*, 78 Ind. 90. It is undoubtedly true that the special injury is the gist of the action, and that facts showing such an injury must be alleged. Where it appears that lands abut upon a highway, and that the highway supplies the only means of ingress and egress, and that the obstructions permanently destroy the way, a special injury is shown. *Ross v. Thompson*, *supra*, and authorities there cited. If a person is by an unlawful act deprived of all means of getting to and from his property, he suffers an injury different not only in degree, but

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in kind, from other citizens. The right to free passage upon a highway is a common right, to be vindicated otherwise than by a private action; but the unlawful destruction of the means of access to private property affects the individual owner, and not the public. A right of access to one's own property is a private right to be vindicated by a private action or not at all. We are not, of course, speaking of cases where the access is made more difficult or the route more circuitous, but of cases, such as the complaint attempts to make, of total deprivation of the right. But we come again to the infirmity in the complaint. We can not conclude as matter of law from the facts stated, that there is anything more than a reasonable and temporary use of the highway for a lawful purpose.

The judgment must be affirmed.

79 502
129 459

No. 8522.

MELLOH v. DEMOTT.

JUSTICE OF THE PEACE.—*Title to Real Estate, When in Issue.—Jurisdiction.*—

The jurisdiction of a justice in an action for the recovery of possession of real estate is not ousted by an answer concerning the title, unless it is made evident that the title itself must be tried.

SAME.—*Real Estate, Action to Recover.—Lease.*—In an action before a justice of the peace for the possession of land, an answer, that, upon foreclosure of a mortgage made by the plaintiff, the sheriff had sold and conveyed to a purchaser, who had made a lease to the defendant, under which he had taken and was holding peaceable possession, does not necessarily bring the title in issue. The facts stated may be confessed and avoided.

From the Marion Superior Court.

J. Buchanan and G. B. Manlove, for appellant.

B. F. Davis, for appellee.

WOODS, J.—The action in this case was commenced before a justice of the peace, who, upon the filing of a sworn an-

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swer, which was deemed to put in issue the title to real estate, certified the case to the superior court, which, at special term, on motion of the plaintiff, remanded the case to the justice of the peace. The defendant appealed from the judgment and order of the special term to the court in general term, and from the judgment in general term, affirming the judgment at the special term, has appealed to this court.

The substance of the complaint is, that in April, 1879, the plaintiff, Demott, was in the rightful and exclusive possession of a certain enclosed body of land which is described, and the defendant, Melloh, did unlawfully and wrongfully break and enter into the plaintiff's said close and lands, and subsequently has had and maintained the control thereof, against the plaintiff's will, and has destroyed grass and herbage and removed the fences to plaintiff's damage, for which he demands judgment in the sum of two hundred dollars.

The appellant's answer consisted of a general denial, and a verified plea of the following substance:

That he entered and took peaceable possession of the property under a lease, for one year, from Samuel Bingham, the owner of the land, who had purchased it at sheriff's sale on a decree of foreclosure of a mortgage, executed by the plaintiff, and after the expiration of a year from the date of the sale, no redemption having been made, had received the sheriff's deed, whereby all the right, title and interest of the plaintiff in and to the lands were transferred to said Bingham, and thereafter the plaintiff voluntarily vacated and surrendered the premises, and the defendant, as lessee of Bingham, the owner of the legal title, took peaceable possession.

The title of the land was not put in issue by this plea. The gist of the complaint was the unlawful breaking of the defendant into a possession then peaceably and rightfully held by the plaintiff.

The answer is good as an argumentative denial, it being averred that the plaintiff had voluntarily vacated, and that the defendant had entered peaceably. This made a complete is-

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sue, and apparently the sole issue to be tried. The averments concerning the foreclosure, sale and conveyance do not certainly have any direct bearing upon that issue, and therefore furnished no ground for transferring the case. Conceding the facts alleged concerning the foreclosure sale, it may yet have been that the plaintiff had acquired the right to remain in possession, by a lease from Bingham, or by a contract with him, made before that of the defendant; and so the plaintiff might have made out his case without denying the title set up in the answer. The jurisdiction of a justice in such a case can not be ousted by an answer concerning the title, unless it is made to appear that the title itself must be tried. Section 12 of the act concerning justices of the peace, 2 R. S. 1876, p. 607, contains the law on the subject and reads as follows:

“If the title to land shall be put in issue by plea supported by affidavit, or shall manifestly appear from the proof on the trial to be in issue, the justice shall, without further proceeding, certify the cause and papers to the circuit court of the proper county, where the same shall be tried.”

The question is discussed by counsel, whether it was competent for the justice to send the case to the superior court, if the title to real estate had been put in issue, and whether the case ought not to have been sent to the circuit court. The conclusion already reached makes it unnecessary to consider that question.

Judgment affirmed, with costs.

No. 9052.

THE CITY OF INDIANAPOLIS v. KOLLMAN.

BILL OF EXCEPTIONS.—*Filing.*—When a bill of exceptions is signed in vacation, it will not be deemed a part of the record, unless it appear otherwise than by the bill itself, that time was given to prepare it.

FORMER ADJUDICATION.—*Verdict.*—*Evidence.*—*Special Findings.*—Complaint in two paragraphs to recover for personal injury, loss of service and

79	504
147	503
79	504
152	297
79	504
158	688

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expenses of care of plaintiff's wife in consequence of an accident caused by a defective alley of the defendant. Answer, 1. General denial. 2. To one paragraph of the complaint a former judgment, in a suit for the same cause, recovered by the plaintiff and wife against the defendant, which has been paid. Reply, 1. General denial. 2. That, on the trial of the former cause, the court excluded all evidence of the expenses of nursing and reasonable expenses of curing the wife, upon the objection that those matters were not sufficiently pleaded. General verdict for plaintiff, and a finding upon an interrogatory, that the former judgment was for injury to the plaintiff's horse, wagon and produce alone, but the result of the same accident.

Held, that the special finding was not within the issues, and did not entitle the defendant to judgment.

From the Marion Superior Court.

J. A. Henry and M. B. Henry, for appellant.

N. B. Taylor, F. Rand and E. Taylor, for appellee.

MORRIS, C.—The appellee brought this suit against the City of Indianapolis to recover for nursing and medical attendance upon his wife, and for the loss of her services and society, resulting from injuries received by her through the alleged negligence of the appellant. The complaint consists of two paragraphs.

The first states, that on the 15th day of October, 1878, the wife of the appellee, Elizabeth Kollman, while driving a horse and wagon along one of the alleys of the appellant, which it was bound to keep in repair and safe condition, was, together with the horse and wagon, precipitated over a steep declivity on the margin of said alley, constructed by the city and left unguarded, without fault on her part, whereby his said wife was injured, and he was put to great expense in procuring proper nursing, medicine and medical attendance in and about the recovery of his said wife, to his damage \$1,000.

The second paragraph is like the first, except that it states that, in consequence of the injury to his wife, he was deprived of her society and lost her services, to his damage, etc.

The appellant answered the complaint by a general denial, and also by a special paragraph, pleaded to the first paragraph

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of the complaint, alleging that the appellee and his wife, Elizabeth Kollman, on the — day of —, 1878, filed in the superior court of Marion county, Indiana, their complaint against the appellant, wherein they alleged, in substance and effect, the same matters pleaded in the first paragraph of the appellee's complaint, claiming particularly that the appellee had laid out and expended for nursing his said wife and for necessary physicians' bills, in attempting to cure her, the sum of \$1,000, and for which, in addition to the other matters contained in said complaint, the plaintiff demanded judgment; that thereafter, issue being joined on said complaint, said cause was tried in said court and the plaintiffs in said action recovered a judgment against the appellant for \$1,000 and the costs of the suit, which judgment was afterwards paid by the appellant. Wherefore the matters set forth in said first paragraph of the appellee's complaint had been adjudicated, etc.

To the second paragraph of the answer, the appellee demurred. The demurrer was overruled, and he replied in two paragraphs, the first being the general denial.

The second paragraph of the reply admitted that the appellee and his wife had filed their complaint as stated in the second paragraph of the answer, and that issue had been joined and a judgment recovered as stated in said answer, and that the same was afterwards paid by the appellant, but it averred that on the trial of said issue the plaintiffs in said action offered to prove the expenses incurred by the appellee in nursing his said wife and the reasonable physicians' bill in curing her, but that, upon the objection of the appellant that said matters were not properly pleaded, the court refused to permit the plaintiffs in said action to offer any proof as to such expenses, etc.

The issues being joined, the cause was submitted to a jury for trial, who returned a general verdict for the appellee, together with the following answers to the following interrogatories asked by the appellee:

The City of Indianapolis v. Kollman.

"1. Were the matters sued for in this action sued for in the suit number 23,244, in this court, of *Kollman v. The City of Indianapolis*? Ans. No.

"2. Was not the suit number 23,244, of *Henry Kollman v. The City of Indianapolis*, for the horse and wagon and produce alone? Ans. Yes."

And also the following answers to the following interrogatories submitted to the jury by the appellant:

"1. Did not the matters sued for in cause number 23,244 of the superior court, in which Henry Kollman was plaintiff and the City of Indianapolis defendant, grow out of the same accident on account of which the plaintiff seeks to recover in this action? Ans. Yes.

"2. Was not the accident to the plaintiff's wife, by reason of which he seeks to recover in this action, caused at the same time that the plaintiff's horse, wagon and produce were injured, and for which he sued and recovered judgment against the city of Indianapolis for \$60, in cause number 23,244 of the superior court of Marion county, Indiana, in which Henry Kollman was plaintiff and the City of Indianapolis was defendant? Ans. Yes."

The record then proceeds as follows: "Comes now the defendant, the City of Indianapolis, by her counsel, and files her motion for a new trial of this cause, in the words and figures following, viz.: (hereafter inserted in the bill of exceptions; see page 278, line 1, of this transcript.)

"The defendant, by counsel, also files her motion for judgment on the special findings of the jury herein, in the words and figures following, viz.: (inserted hereafter in the bill of exceptions; see page — line — of this transcript.)"

These motions were overruled by the court, and judgment rendered for the appellees.

The appellant appealed to the general term of said court, assigning errors as follows:

1. Because the complaint in said cause does not state facts sufficient to constitute a good cause of action.

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2. The court at special term erred in overruling the appellant's motion for a new trial.

3. The court at special term erred in overruling the appellant's motion for judgment on the special findings of the jury, notwithstanding the general verdict in favor of the appellee, which was excepted to at the time.

The court in general term affirmed the judgment rendered at the special term. The error assigned here is the affirmance of the judgment rendered at the special term by the court in general term.

As the appellant does not question in argument the sufficiency of the complaint, its defects, if any, must be considered as waived. The counsel for the appellant say: "The principal and perhaps the only question of importance in the record is the question of former adjudication of the matters set forth in this action. This question is raised, 1st, by the motion for a new trial; 2d, by a motion for judgment *non obstante veredicto*."

The motion for a new trial, as well as the motion for judgment notwithstanding the verdict, is found in what purports to be a bill of exceptions and a part of the record, and neither is found in any other part of the record.

It appears that final judgment was rendered at special term upon the verdict of the jury at the November term, 1879, and on the 22d day of November. The bill of exceptions appears to have been filed on the 19th day of December, 1879, that being the December term of said court. At the conclusion of the bill of exceptions is this statement: "And thirty days time was given the defendant in which to prepare and file her bill of exceptions."

The above is the only statement to be found in the record as to the giving of time by the court to prepare and file a bill of exceptions. Unless time was given for that purpose, the bill of exceptions in this case is unauthorized. If time was given, it must, in the very nature of things, have been given by the court before the preparation of the bill of exceptions, and, by

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the terms of the statute, it must have been given by the court in term, and not by the judge in vacation. And whether time was given in this case, must be determined by the record of the court made during the term at which the leave was given, and not by the recital of the fact in the bill of exceptions, signed by the judge in vacation or at a subsequent term. It is not competent for the judge to make up the record of what was done in court by recitals in a bill of exceptions, except when authorized by statute so to do.

In the case of *Nye v. Lewis*, 65 Ind. 326, the court says: "The Legislature never contemplated that the court or judge should assume to insert in the bill of exceptions, where it is signed after the term, that leave was given at the term to file the same after the term." The court further says: "And, where the record fails to show the grant of such special leave, the judge has no jurisdiction or power to sign a bill after the expiration of the term." *Schoonover v. Reed*, 65 Ind. 313; *Goodwin v. Smith*, 72 Ind. 113; *Applegate v. White*, ante, p. 413.

The record, aside from the bill of exceptions, not showing that leave was given to file it after the term, it can not be regarded as a part of the record. And as the motion for a new trial and the motion for judgment *non obstante* are found only in the bill of exceptions, and not in the record, it would seem that no question is before this court for decision. But were we to regard these motions as a part of the record, we should reach the same result.

The argument of the appellant is, that the injury to the horse, wagon and produce of the appellee, and the injury to his wife, whereby he incurred expense, loss of service and the society of his wife, resulting from one and the same accident, constituted but one cause of action; that the appellee could not divide this cause of action, and bring two suits upon it—one for the injury to the horse, wagon and produce, and the other for the loss of service, the society of the wife, and the expense incurred in curing her; and that, as the jury had found that the cause of action set forth in the complaint

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grew out of the same accident which caused the injury to his horse, wagon and produce, and at the same time, for which he had previously recovered a judgment in an action instituted by him against the appellant, he can not maintain this action. Were the facts specially found by the jury within the issues joined in this case, we might be inclined to sustain the appellant's views—they are not without authority for their support.

But are the facts specially found by the jury within the issues? It will not be pretended that they are within the issues formed upon the second paragraph of the appellant's answer. Are they within the issue formed by the general denial of the complaint? The denial only puts in issue the facts stated in the complaint. It puts the plaintiff upon proof of the facts averred in his complaint. It authorizes proof, on the part of the defendant, of every fact which will disprove the averments of the complaint, and nothing more. As there was no averment in the complaint in regard to any recovery by the appellee for the injury to his horse, wagon or produce, neither party could introduce proof of such recovery to establish the fact that a judgment had been obtained by the appellee for any damages occasioned by such injury. The special findings of the jury were, therefore, outside of the issues, and can neither control the general verdict nor entitle the appellant to judgment upon them. We conclude that there was no error in overruling the motion of the appellant for judgment notwithstanding the general verdict.

As the evidence is not in the record, we can not say that there was error in the instructions given to the jury by the court. The evidence in the case might have been such as to render them entirely proper. The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

Eiceman v. Finch.

No. 9034.

EICEMAN v. FINCH.

REDEMPTION.—*Complaint.—Payment of Purchase-Money.*—A complaint for the redemption of land sold upon foreclosure of a mortgage, which does not allege that the purchase-money and ten per centum interest have been paid to the clerk, is insufficient.

SAME.—*Undivided Interest.*—The owner of an undivided interest may not redeem it only, but must redeem the entire parcel.

SAME.—*Statute, Compliance With.*—One who seeks the benefit of the statute giving a right of redemption must fully comply with its requirements.

SAME.—*Statutory Right.*—The general equitable right of redemption is forever barred by the decree and sale; the statutory right springs into existence with the sale, continues for one year and then expires.

JUDGMENTS.—*Husband and Wife.*—The liens of judgments obtained on the lands of the husband prior to marriage are paramount to the rights of his wife in the lands.

From the Spencer Circuit Court.

G. L. Reinhard, C. H. Mason, J. B. Elam and W. T. Brown,
for appellant.

D. T. Laird and C. L. Wedding, for appellee.

ELLIOTT, C. J.—Appellant was married to Augustus Eiceman on the 13th day of September, 1877, and is his second wife. Prior to the 11th day of November, 1876, divers judgments were recovered against the said Augustus, which became liens on lands owned by him and which are here the subject of litigation. On the date named, Eiceman and his then wife, Catherine, executed a mortgage on part of the land, which was recorded on the day it was executed. The appellant joined with her husband in the execution of a mortgage upon the real estate, on the 8th day of June, 1878. These two mortgages became the property of appellee, and were foreclosed by a decree of the Spencer Circuit Court, on the 28th day of October, 1879. Appellant was a party to the action in which this decree was rendered. Sale was made and the avails applied in satisfaction of the judgments aforesaid and in discharge of the decree of foreclosure. Appellant asserts a right to redeem the lands sold, but does not tender any money in redemption, nor does she allege that any tender has been made.

79	511
125	392
196	409
79	511
129	321
79	511
131	654
79	511
148	699
79	511
153	535
79	511
158	322
79	511
162	278

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In her complaint she offers "to pay whatever sum may be due on said judgments and the mortgages and all costs for which she may be liable."

Judgments obtained prior to marriage are liens on the lands of the husband, and are not divested by his subsequent marriage. The judgments described in the complaint were liens paramount to the marital rights of the appellant in the land of her husband. The mortgage executed by Augustus Eiceman and his then wife, on the 11th day of November, 1876, constitutes a lien superior to the rights of appellant. The mortgage in which she joined created a right which entitled the mortgagee to a decree of foreclosure barring her equity of redemption. It is clear, therefore, that the appellant has no right to redeem under the equity of redemption established by the English courts of chancery and adopted by our Legislatures and courts, because that equity was barred by the decree of foreclosure rendered in the suit to which she was a party. It needs no citation of authority to support the proposition that the equitable right to redeem is barred by the decree and sale. This is the statutory rule.

There are two rights of redemption; the general equitable right and the statutory right. The former is forever barred by the decree and sale; the latter does not spring into existence until the sale takes place. This statutory right comes into existence with the sale; it continues for one year and then expires.

The decree of foreclosure cut off the general equity of redemption, and the only question is whether the case is one in which the statutory right can be exercised. This right was not and could not be cut off by the decree, for the plain reason that it did not spring into existence until after the decree was entered and carried into execution. *Cox v. Vickers*, 35 Ind. 27; *Kissel v. Eaton*, 64 Ind. 248.

Whether the decree barring appellant's general equity of redemption was right or wrong, can not be here made the subject of investigation. The familiar rule, that a party can not collaterally impeach a judgment, precludes all inquiry into

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the validity of the decree rendered in the foreclosure suit, to which appellant was a party.

The only question, then, is whether the case is one entitling the appellant to avail herself of the statutory right of redeeming within one year from the sale.

We need not stop to decide whether the appellant would have been entitled to redeem if she had fully complied with the terms of the statute. Whether she was or was not entitled to redeem because of her interest as the wife of the judgment debtor, is here unimportant because it is very clear that she has not complied with the requirements of the law.

The right of redemption given by statute must be exercised in the manner prescribed. One who seeks the benefit of the statute must fully comply with its requirements. *Hall v. Thomas*, 27 Barb. 55 ; *Silliman v. Wing*, 7 Hill, 159 ; *Hughes v. Feeter*, 23 Iowa, 547 ; *Ex Parte The Bank of Monroe*, 7 Hill, 177. The statute in express terms requires that the purchase-money and ten per centum interest shall be paid to the clerk. Acts 1879, p. 176 ; R. S. 1881, sec. 768. The appellant did not comply with this requirement.

Independently of this statutory provision, the owner of an undivided interest in land can not redeem his interest. The statute in force when the sale of the real estate here in controversy was made provides that "Any person having an undivided interest in the property sold may redeem the same as herein provided, and if he so redeem, he shall have a lien on the several shares of the other owners for their respective shares of the redemption money, with ten per cent. interest." Acts 1879, p. 177. This provision forbids the redemption of an undivided interest, and requires a redemption of all the property sold. It vests in the owner of the undivided interest a right to redeem, but couples it with the burden of redeeming the entire parcel. This is fatal to appellant's claim. She offers only to redeem her undivided share.

Judgment affirmed.

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No. 7935.

CATTERLIN ET AL. v. ARMSTRONG.

FORECLOSURE.—Senior and Junior Mortgages.—The rights of a junior mortgagee are in no wise affected by the foreclosure of a senior mortgage, unless he is made a party to the foreclosure proceeding.

SAME.—Purchaser With Notice of Junior Mortgage Holds as Mortgagor.—Permanent Improvements Subject to Lien.—The purchaser under the foreclosure of a senior mortgage, having constructive notice of a junior mortgage duly recorded, holds the land as if he had himself mortgaged it, and all buildings and permanent improvements made by him thereon become subject to the lien of the junior mortgage.

SAME.—Value of Land.—In an action by a junior mortgagee against a mortgagor and the purchaser under a foreclosure of the senior mortgage, the value of the land at the time he bought it is not in question.

SAME.—Complaint.—In an action to foreclose a mortgage as to part only of the property mortgaged, the complaint alleging that the other lands embraced therein had been sold on judgments rendered prior to the date of the mortgage, no error is committed in refusing to require the plaintiff to foreclose as to the tracts so sold.

SAME.—Improvements and Taxes.—Cross Complaint.—Counter-Claim.—In such action, the purchaser, not being liable for rents and profits, can not by cross complaint require that he be allowed for his improvements and taxes paid, but may by counter-claim ask that upon default of a redemption by either, and on sale, upon foreclosure, the proceeds of the sale be applied first to reimburse him and then in payment of the junior mortgage, and that the surplus, if any, be paid to him.

SAME.—Redemption.—In such case, a finding that the junior mortgagee ought to redeem by paying the purchaser within a fixed time an ascertained amount is contrary to law. A junior mortgagee is under no obligation to redeem the first mortgage. He may foreclose without redeeming.

SAME.—Improvements.—Covenant.—In a suit for foreclosure, the mortgagor is not entitled, as against the mortgagee, to be allowed for improvements made by him on the mortgaged property, unless there be a covenant in the mortgage for such allowance in case of foreclosure.

SAME.—Statute of Limitations.—An action to foreclose a mortgage may be commenced within twenty years after the cause of action accrued.

PRACTICE.—Inspection of Papers.—Notice.—Due notice of a motion for an order granting an inspection of papers is necessary.

PAROL EVIDENCE.—Indemnity Mortgage.—Payments.—In an action to foreclose an indemnity mortgage, parol evidence is admissible to prove payments made upon notes set forth and described in the mortgage, without producing or accounting for the notes.

From the Clinton Circuit Court.

Catterlin et al. v. Armstrong.

J. N. Sims, for appellants.

L. McClurg and *J. V. Kent*, for appellee.

BICKNELL, C. C.—In September, 1851, John W. Blake mortgaged land to Moses A. Kerr. Afterwards, in August, 1859, he and his wife mortgaged the same land and other lands to the appellee, to indemnify him as surety for Blake on certain notes. This mortgage was duly recorded. Kerr obtained a decree foreclosing his mortgage in June, 1860, but did not make Armstrong a party to the foreclosure suit. The land was sold under Kerr's decree, in August, 1860, and the appellant Catterlin bought it for \$305.50, and put valuable buildings upon it. All the other land embraced in the mortgage to Armstrong, except the land in controversy, was sold under executions issued on judgments rendered against Blake before the date of the mortgage to Armstrong. Catterlin has been in possession of the land ever since his purchase, and has enjoyed the rents and profits thereof, which accrued solely by reason of his improvements—the property when he bought it had no rental value. Armstrong, as surety for Blake, had to pay, upon the matters covered by the indemnity mortgage, several thousand dollars. At the March term, 1878, of the Clinton Circuit Court, Armstrong, the junior mortgagee, brought this suit against Catterlin and Blake and wife to foreclose his mortgage. This suit was commenced on the 26th of February, 1878, more than seventeen and a half years after the date of the mortgage.

The complaint stated all the foregoing facts except the improvements of Catterlin, alleged that Catterlin had received rents and profits more than enough to repay him the purchase-money of the land, and prayed for judgment against Blake, and the foreclosure of said junior mortgage, and for an account of the rents and profits, and that the land be sold and proceeds applied, first, to the payment of Catterlin's purchase-money, to wit, \$305.50, with interest, less the amount of the rents and profits; and second, to the payment of the judg-

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ment to be rendered in favor of Armstrong against Blake, and for all other proper relief.

The substance of Armstrong's claim is, that all of Catterlin's rents and profits shall be taken to pay Armstrong's claim, and that Catterlin shall lose both his property and rents, and have nothing but his \$305.50, and interest, although he holds the property as owner, subject only to Armstrong's mortgage.

The defendants moved to make said complaint more specific, which motion was overruled. The defendant Catterlin then moved that the plaintiff be compelled to amend his complaint, so as to ask a foreclosure of his mortgage against the other parcels of land therein described, and to seek relief against such property before selling any of said defendant's property, and this motion was overruled.

The defendant Catterlin then demurred to the complaint for the want of facts sufficient, etc., and said demurrer was overruled. The defendants then moved to strike out parts of the complaint, and this motion was overruled. The defendants then moved for a bill of particulars of the moneys paid by said plaintiff as surety for said Blake, and this motion was overruled.

The defendants then answered the complaint. Catterlin answered separately :

1st. In denial.

2d. That the cause of action as to him did not arise within fifteen years next before suit brought.

3d. Payment before suit brought.

4th. Accord and satisfaction before suit brought.

5th. That he paid for the property its full cash value, and that it had of itself no rental value, and that all the rents thereof are the result of the improvements by him placed upon the property.

6th. That when he bought the property it had no improvements except an old worn-out one-story frame building, not fit to live in and of no rental or other value ; that he bought the property without actual knowledge of plaintiff's mortgage and afterward took away the old building and put on the property

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a two-story block of brick buildings at an expense of \$10,000, and that plaintiff stood by and saw defendant buy and pay for the land, and had full knowledge of defendant's improvements as they were made, and failed to notify defendant of his said claim. Wherefore said plaintiff is estopped, etc.

7th. That he paid the full value of the property and bought and made his improvements without actual notice of the plaintiff's mortgage; that he built on said mortgaged land and on adjoining land a building worth \$10,000; that the part of the building covering said mortgaged land is worth \$6,000; that plaintiff stood by and saw him make said purchase and improvements, without giving any notice of his said claim. Wherefore defendant asks that if there be a foreclosure of plaintiff's mortgage an account be taken, and that plaintiff have foreclosure for so much only as said land was worth over and above the purchase-money, and for the rental value thereof, aside from the rental value arising from said improvements, and over and above the lawful interest on said purchase-money.

The plaintiff replied in denial of the third and fourth paragraphs of said answer, and demurred to each of the other paragraphs except the first for want of facts sufficient, etc., and all of said demurrers were sustained.

The defendant Blake and wife answered jointly: 1st. In denial. 2d. Payment. 3d. Accord and satisfaction.

The plaintiff replied in denial of the second and third paragraphs of this joint answer, and the cause was then at issue as to all of the defendants upon the complaint, the general denial and the pleas of payment and accord and satisfaction denied.

The defendant Catterlin then filed a cross complaint in two paragraphs, to wit:

1st. That he has made improvements on said property of the value of \$7,000; that without such improvements the property is not worth more than \$300; that for eighteen years

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past he has paid taxes on said property, to wit, \$100 per year, and he prays that, in case of foreclosure, he may have credit for the moneys so expended in improvements and taxes, with six per cent. interest, in all \$18,000, and that the property shall not be sold for less than \$18,000, unless plaintiff will pay to said defendant the deficiency, and that said defendant be fully indemnified for his said outlays and the interest thereon, and that the costs of this suit be paid before any of the proceeds of said property be applied in discharge of said plaintiff's claim.

2d. That he bought and paid for said property in good faith and without knowledge of plaintiff's claim, and has put valuable improvements thereon, and paid taxes therefor, amounting in all to \$10,000, on which interest has accrued, to wit, \$8,000, which he asks may be taken into account, and that the property may not be sold until the plaintiff pays defendant said sums of money and the costs of this suit.

The plaintiff demurred to each of the paragraphs of said cross complaint for want of facts sufficient, etc., and said demurrers were overruled.

The plaintiff then moved to strike out certain parts of said cross complaint, and the court struck out the following, to wit: "That said premises without said improvements were not worth more than \$300;" and also the prayer, that "the property shall not be sold for less than \$18,000, unless plaintiff will pay to said defendant the deficiency."

The plaintiff then answered the cross complaint by a general denial.

The defendants moved for an order for an inspection of the notes which it was alleged the plaintiff had paid as surety for Blake, and said motion was overruled by the court.

The issues joined were tried by the court without a jury, and the court found \$4,413.10 due from Blake to the plaintiff, and that Catterlin, for permanent improvements, purchase-money and taxes, was entitled, over and above the rents received by him, to the sum of \$1,685.95, and that the plaintiff

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ought to redeem said property by paying Catterlin \$1,685.95, in ninety days.

Judgment was rendered in favor of the plaintiff against Blake for \$4,413.10, and costs, and that the equity of redemption of Blake and wife in said land be foreclosed, and that, upon the redemption of the land by the plaintiff, the same should be sold by the sheriff, and the proceeds applied,

1st. In payment of costs.

2d. In payment of this judgment.

3d. In payment to Armstrong of the said amount to be paid by him for redemption.

4th. The overplus, if any, to be paid to said Catterlin, and if the premises should fail to sell for enough to pay said judgment, principal, interest and costs, then the residue should be levied of the property of the defendant Blake.

It appears from the record that this judgment was rendered on the 15th of January, 1879, over the objection and exception of the defendants. On the day following, the defendants moved in arrest of judgment, "for reasons apparent on the records," and this motion was overruled.

The defendant Catterlin moved for a new trial for the following reasons:

1. Error in the assessment by the court of the amount of recovery, the same being too large.

2. Error in the credits allowed to this defendant, the same being too small.

3. That the finding is not sustained by sufficient evidence.

4. That the finding was contrary to the evidence.

5. That the finding was contrary to law.

6. Error of law at the trial:

A. In admitting parol evidence to prove payment by plaintiff as surety and endorser for Blake, without producing the notes and instruments on which said payments were claimed to be made, and without surrendering the same for cancellation, or for the use of said defendant Catterlin.

B. In permitting the plaintiff to prove payment by him of

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a note purporting to have been executed by plaintiff alone to one John M. Cowan, and dated after the date of plaintiff's mortgage.

C. In refusing to permit the said defendant to prove that the ground in controversy, with the improvements then on it, was not, on the 11th day of August, 1860, worth more than \$305.50.

The defendants Blake and wife moved for a new trial for the following reasons:

1st. The finding and judgment are not sustained by sufficient evidence.

2d. The finding and judgment are contrary to the evidence.

3d. The finding and judgment are contrary to law.

4th. Error in the amount of the recovery, the same being too large.

5th. Error of law occurring at the trial, in permitting the plaintiff to prove by parol testimony, payments made by him as surety and endorser for Blake, without producing the notes and instruments on which such payments were made, and without surrendering the same for cancellation.

These motions for a new trial were overruled, and the defendants appealed from the judgment.

The appellants assign errors jointly, as follows:

1. In overruling appellants' motion that the complaint be made more specific.

2. In overruling appellants' motion for a bill of particulars.

The appellant Catterlin assigns errors severally, as follows:

1. In refusing to require the appellee to amend his complaint, so as to ask foreclosure of his mortgage as to the other lands embraced therein.

2. In overruling the motion that the complaint be made more specific.

3. In overruling the demurrer to the complaint.

4. In sustaining the appellee's demurrers to the second, fifth, sixth and seventh paragraphs of this appellant's answer.

5. In sustaining the appellee's motion to strike out certain words from this appellant's cross complaint.

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6. In overruling this appellant's motion for an inspection of the notes mentioned in his complaint.

7. In overruling appellant's motion for a new trial.

8. In rendering the judgment and decree of foreclosure in manner and form as set out in the record.

The appellants Blake and wife assign error jointly, as follows:

1. The court erred in overruling their motion for a new trial.

The appellee assigns cross errors as follows:

1. In overruling appellee's demurrer to the first paragraph of the cross complaint of the appellant Catterlin.

2. In overruling appellee's demurrer to the second paragraph of the cross complaint of Catterlin.

First. As to the demurrer to the complaint. The complaint was not a bill to redeem; it was a complaint by a junior mortgagee to foreclose his mortgage, after a foreclosure and sale under a senior mortgage in a suit to which the junior mortgagee was not made a party.

It is well settled in Indiana, that the rights of a junior mortgagee are in no wise affected by the foreclosure of a senior mortgage, unless he is made a party to the foreclosure proceeding. *Hosford v. Johnson*, 74 Ind. 479, and cases there cited. The appellee, therefore, had a right to foreclose his mortgage; his complaint was sufficient for that purpose. In such a case, superfluous allegations and a prayer for inappropriate relief, in addition to the foreclosure, are not ground of demurrer. There was no error in overruling the demurrer to the complaint.

The purchaser under the foreclosure of the senior mortgage had constructive notice of the junior mortgage, which had been duly recorded, and was on record at the time of the purchase. He therefore bought the property subject to that junior mortgage, and held it just the same as if he had himself mortgaged it to the junior mortgagee, and all buildings and permanent improvements, made by him upon the mort-

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gaged property, became subject to the lien of the junior mortgage. Jones on Mortgages, sections 147 and 681, and cases there cited; *Coleman v. Witherspoon*, 76 Ind. 285. In a suit for foreclosure, the mortgagor is not entitled, as against the mortgagee, to be allowed for improvements made by him on the mortgaged property, unless there be a covenant in the mortgage for such allowance in case of foreclosure. *Childs v. Dolan*, 5 Allen, 319; *Phillips v. Holmes*, 78 N. C. 191.

It is not absolutely necessary to consider what the rule would be on a complaint to redeem, because the complaint in the case at bar does not ask for redemption; there is no allegation of tender of the amount necessary to redeem, and no offer to pay that amount. *Allerton v. Belden*, 49 N. Y. 373; *Silsbee v. Smith*, 60 Barb. 372. It is true that where a mortgagee is in possession, and redemption is sought against him, he is chargeable with the rents and profits, and in that case, if the complaint shows that the mortgagee has received rents and profits enough to pay principal and interest of his debt, a tender or offer to pay is not necessary. *Calkins v. Isbell*, 20 N. Y. 147; Jones on Mortgages, section 1096. But in that case the complaint should allege payment of the mortgage and demand an accounting. *Ibid.* The complaint in the present case, claiming only foreclosure and not claiming redemption, contains an averment as to the rents and profits and asks an accounting, and the prayer of the complaint is as follows:

“Wherefore plaintiff prays judgment against said John W. Blake for the sum of \$10,000 and the foreclosure of the said mortgage to the plaintiff as aforesaid on said real estate; that the equity of redemption of said real estate mortgaged be foreclosed; that an account be had of the rents and profits of said real estate enjoyed by said Catterlin; that said real estate be ordered sold for the purpose of making the said sum due the plaintiff; that said sheriff's sale to said Catterlin be declared null and void, or that the said lands be ordered sold and the proceeds of said sale be applied, first, to the payment of the

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said bid made by said Catterlin at said sheriff's sale, with the interest thereon, less the rents and profits enjoyed by said Catterlin; second, to pay any judgment obtained in this suit by the plaintiff; and that the plaintiff may have such other and further relief as he may be entitled to in law or equity."

The complaint does not differ from an ordinary complaint for foreclosure, except that it claims a share of Catterlin's rents and profits.

As already stated, the complaint contains a good cause of action for foreclosure; but the allegations as to the rents and profits and the accounting are mere surplusage; there is no cause of action against Catterlin, the purchaser at the foreclosure sale, for rents and profits; he holds the property as his own, subject to Armstrong's mortgage; the property and everything upon it, in the way of fixtures and permanent improvements, are liable to be sold to satisfy that mortgage, and that is all to which the plaintiff is equitably entitled upon the present complaint. Even upon a complaint to redeem, Catterlin would not be liable to account for the rents and profits. A purchaser at a foreclosure sale, defective because a junior mortgagee was not made a party, upon a subsequent redemption by the latter, must account for the rents and profits, if such sale operates merely as an assignment of the first mortgage. *Ten Eyck v. Casad*, 15 Iowa, 524. But if the sale operates not only as an assignment of a prior mortgage, but as a foreclosure of the equity of redemption, subject to the junior mortgage, the purchaser standing in the place of the mortgagor or owner of the premises is not liable to account for the rents and profits. *Renard v. Brown*, 7 Neb. 449; *Jones on Mortgages*, 1118. And even where a mortgagee in possession is liable, upon a complaint to redeem, for ordinary rents and profits, he is not liable for such rents and profits as are directly the fruit of permanent improvements made by him, and arise exclusively from such improvements. *Moore v. Cable*, 1 Johns. Ch. 385. Such mortgagee will not be charged with the increased rents and profits arising from the use of any permanent improve-

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ments made by himself. *Bell v. The Mayor of New York*,¹⁰ Paige, 49.

The complaint being sufficient as a complaint for foreclosure, and the junior mortgage being a part of the complaint, and the notes secured thereby being set forth in said mortgage, there was no error in overruling the motion to make the complaint more specific, nor in overruling the motion for a bill of particulars; and, inasmuch as the complaint averred that all the other property embraced in the junior mortgage had been sold on execution, on judgments against Blake, rendered prior to the date of such mortgage, there was no error in refusing to require the appellee to amend his complaint so as to ask foreclosure as to such other lands.

There was no error in sustaining the appellee's demurrer to Catterlin's second paragraph of answer, which pleaded the statute of limitation of fifteen years; the time of limitation in such a case is twenty years. Practice act, sec. 211, clause 5.

And there was no error in sustaining the appellee's demurrers to the fifth, sixth and seventh paragraphs of Catterlin's answer. The matters set up in those paragraphs are not good defences to a suit for foreclosure.

There was no error in sustaining the appellee's motion to strike out certain words from the appellant Catterlin's cross complaint, as will appear fully hereafter in considering the cross errors assigned.

And there was no error in overruling the appellant's motion for an inspection of the notes mentioned in the appellee's mortgage. Section 306 of the code provides that "The court or a judge thereof, may, under proper restrictions, upon due notice, order either party to give the other, within a specified time, an inspection," etc. The record does not show that any notice of such motion was given in this case.

As to the reasons alleged for a new trial, there was no error in admitting parol evidence to prove the payments made by Armstrong upon the notes set forth and recited in the mortgage, and it was not necessary to produce those notes at the

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trial, nor to give any reason for their non-production, and it made no difference whether the payments were made upon those notes or upon other notes given in renewal thereof, or in exchange therefor. And there was no error in refusing to permit the appellant Catterlin to prove the value of the land at the time he bought it; the land was subject to the mortgage, whether it was increased or diminished in value.

But it appears from what has already been stated, that the finding and judgment were contrary to law. The defendant Catterlin was not liable to account for his rents and profits, and the finding that the appellee ought to redeem said property by paying Catterlin \$1,685.95, in ninety days, can not be sustained. A junior mortgagee is under no obligation to redeem the first mortgage; he may foreclose without redeeming. *Cain v. Hanna*, 63 Ind. 408. And even on a bill to redeem, in a case of this kind, the purchaser under the first mortgage, standing in the place of the mortgagor, as owner of the premises subject to the junior mortgage, would not be liable to account for the rents and profits. *Renard v. Brown*, *supra*.

The finding and judgment of the court below would be wrong even if this were a suit to redeem, or even if the prayer for other relief should be construed to include a prayer for redemption. A junior incumbrancer, who, not having been made a party to a foreclosure of a prior mortgage, afterwards redeems, redeems not the premises, but the prior incumbrance, and he is entitled, not to a conveyance of the premises, but to an assignment of the security. *Fell v. Brown*, 2 Bro. C. C. 276; *Pardee v. Van Anken*, 3 Barb. 534.

Therefore, if the prior mortgagee in such case has become the purchaser at the foreclosure sale and has thus acquired the equity of redemption of the mortgaged premises, the junior mortgagee, upon redeeming, is not entitled to a conveyance of the estate, but to an assignment of the prior mortgage; whereupon the prior mortgagee, as owner of the equity of redemption, may, if he choose, pay the amount due on the junior mortgage, redeeming that. The decree in such a case would

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be that the junior mortgagee redeem the first mortgage; that the first mortgagee, or purchaser, as owner of the equity of redemption, redeem from the junior mortgagee; and if he fail to do so, that the premises be sold to pay, first, the prior mortgage, second, the junior mortgage, and that the surplus, if any, be paid to the purchaser as owner of the equity of redemption. *Renard v. Brown, supra*; Jones on Mortgages, section 1075.

In the present case the appellee, in foreclosing his mortgage, could be entitled to no more than a judgment against Blake for the amount due thereon, and to foreclosure, and an order for the sale of the mortgaged property as it stands, to satisfy such judgment and the costs of this suit, and that the surplus, if any, be paid to the appellant Catterlin, and that for the deficiency, if any, execution be issued against the appellant Blake.

The court erred in overruling the motion for a new trial, and the judgment below ought to be reversed.

The appellees' cross errors are, that the court erred in overruling the demurrers to the first and second paragraphs of the cross complaint of Catterlin. In such a suit for foreclosure, such paragraphs were irrelevant. Catterlin, not being liable for rents and profits, but standing just the same as if he, being owner of the property, had mortgaged it to Armstrong, he had no right to be allowed anything for his improvements or taxes; but he might have filed a counter-claim for the amount paid by him as purchaser with interest, praying that the appellee might be compelled to redeem the first mortgage, and that then he, Catterlin, might redeem the appellee's mortgage, and that, in default of such redemptions, the proceeds of the sale on foreclosure should be applied first to reimburse him as such purchaser, and then in payment of the junior mortgage, and the surplus, if any, to him.

The court erred in overruling the demurrers to the cross complaint, and its judgment ought to be reversed and the cause remanded for a new trial.

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PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things reversed, and that the costs of this appeal be paid one half by the appellee and the other half by the appellants, and this cause is remanded, with instructions to the court below to sustain the demurrers to the first and second paragraphs of the cross complaint, and that both parties have leave to amend their pleadings.

No. 8526.

ARMSTRONG, ADM'R, v. KIRKPATRICK ET AL.

PROMISSORY NOTE.—*Maker.*—*Signature.*—*Principal and Agent.*—*Corporation.*—

The directors of the Howard County Agricultural Association gave a note in which were the words "on," etc., "The Howard County Agricultural Association, who execute this note by her directors, do promise to pay," etc. Signed by T. M. K., A. L. S. "Secretary," and others, followed by the words "Directors Howard County Agricultural Association." Held, in an action thereon, that the note was that of the association and not of the individuals whose names are signed thereto.

From the Howard Circuit Court.

C. N. Pollard and *J. E. Kirk*, for appellant.

J. O'Brien and *M. Garrigus*, for appellees.

WOODS, J.—Action upon the following instrument:

"\$3,264. On the first day of September next after date, The Howard County Agricultural Association, who execute this note by her directors, and the other obligors, whose names are hereto attached as sureties, do promise to pay David Foster at the First National Bank of Kokomo, Indiana, the sum of three thousand two hundred and sixty-four dollars, without any relief whatever from the valuation or appraisement

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laws of the State of Indiana, and ten per cent. interest from date until paid. Kokomo, Indiana, November 1st, 1877.

[Signed]

"T. M. KIRKPATRICK.

"A. L. SHARP, Secretary.

"SAMUEL F. BUTCHER,"

(and ten others),

"Directors Howard County Agricultural Association.

_____, Sureties."

The complaint was in two paragraphs, the first against the Howard County Agricultural Association, as the makers of the note, and the second against the individuals whose names are signed as directors, alleging that they made the note.

The court sustained a demurrer to the second paragraph, and gave the plaintiff judgment upon the first paragraph for the full amount of the note.

The appellant insists that upon its face the instrument is the note of the individuals whose names are signed to it, and not of the agricultural association, and hence that the demurrer to the second paragraph should have been overruled and that to the first paragraph sustained, if either; and, in support of this view, cites from *Hayes v. Matthews*, 63 Ind. 412, the proposition, "that, in order to bind the principal and make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument."

If this were an accurate statement of the rule, the decision of the circuit court could be upheld by it, because the name of the agricultural association appears in the body of the instrument and at the place of signature, and besides it is expressly stated in the body of the writing that the association executes the note, thus putting beyond doubt or cavil what was the intention of the parties in this respect.

But it is not an universal or general rule, that the name of the maker must be both inserted in and signed to the instru-

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ment. *Means v. Swormstedt*, 32 Ind. 87; *Gaff v. Theis*, 33 Ind. 307; *Pease v. Welborn*, 42 Ind. 331; *Jackson School Tp. v. Hadley*, 59 Ind. 534; *School Town of Monticello v. Kendall*, 72 Ind. 91; *Moral School Tp. v. Harrison*, 74 Ind. 93; *Carpenter v. Farnsworth*, 106 Mass. 561; Bigelow Bills & Notes, pp. 46 and 47; 1 Daniel Neg. Inst., sections 298-308; 1 Parsons Notes & Bills, pp. 91-99; Story Prom. Notes, sections 65-70.

Judgment affirmed, with costs.

No. 9059.

CLIFFORD ET AL. v. FARMER ET AL.

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WILL.—Devise.—Descent.—Remainder-Man.—Heirs.—Real estate was devised to the wife of the testator for life, remainder in fee to his children. The wife and children, after his death, united in a joint sale and conveyance of the land to a purchaser, notes and mortgage for the purchase-money being taken in the name of the wife, and finally invested in other lands, title to which was taken in her name.

Held, that upon her death these latter lands went, in equity, to the remainder-men under the will of her husband, and not to her heirs at law, precisely as the estate devised would have gone if it had not been conveyed.

Held, also, that other real estate, purchased by the widow with means derived from the annual profits of the real estate devised, and from the revenue of the avails thereof, descended, on her death, to her heirs at law.

From the Gibson Circuit Court.

W. M. Land, *J. E. McCullough* and *L. C. Embree*, for appellants.

C. Denby, *D. B. Kumler* and *R. M. J. Miller*, for appellees.

MORRIS, C.—This was a suit for the partition of certain real estate situate in Gibson county.

The complaint states that on or about the 16th day of June,
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1879, Louvicey Farmer died intestate at said county, seized in fee of the following real estate, situate in Gibson county, Indiana, to wit: The south half of the southwest quarter of section 17, township 3 south, of range 11 west; also, of the north half of the northwest quarter of section 20 in said township and range, except fifteen and eighty-five hundredths acres off of the south side thereof; also, of lot No. 28, and the undivided half of lot No. 16, and the fraction of land between lots Nos. 28 and 16, all in the town of Francisco, leaving the plaintiffs Cornelius J. E. Clifford, Ambrose C. Clifford, William M. Clifford, Parthena T. Kell (late Clifford), wife of James Kell, and the defendants, Ezekiel Farmer, Washington W. Farmer, Estelle F. Taylor (late Farmer), wife of John J. Taylor, and Cornelia P. Davis, wife of John Davis, her only children, and the plaintiffs Mary Bocock, Lawrence W. Collins, Isadora N. Collins, Arabel M. Collins and Roselle T. Collins, grandchildren, being the heirs of Berella E. Collins, deceased, daughter of said Louvicey Farmer; that, by the death of said Louvicey Farmer, each of her said heirs became seized in fee of an estate in said lands and lots as tenants in common, as follows: Each of said plaintiffs Cornelius J. E. Clifford, Ambrose C. Clifford, William M. Clifford and Parthena T. Kell, and the defendants Ezekiel S. Farmer, Washington W. Farmer, Estelle F. Taylor and Cornelia P. Davis, of one ninth of said real estate; and each of said plaintiffs Mary C. Bocock, Lawrence W. Collins, Isadora N. Collins, Arabel M. Collins and Roselle T. Collins, of one undivided one forty-fifth part of said land. The prayer is that partition of said real estate may be made.

The appellees appeared and answered the complaint in two paragraphs, the first being the general denial.

The second paragraph of the answer states that the appellees Ezekiel, Washington W., Estelle F. and Cornelia P. are the children of one Fleming Farmer, who was, during his lifetime, the husband of said Louvicey Farmer; that, on the 20th day of February, 1866, the said Fleming Farmer, by his

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last will, a copy of which is filed with and made part of this paragraph, devised to the said Louvicey all of the real estate of which he should die seized and all his personal estate, except \$505, for her sole use and benefit during her natural life, and that he devised the remainder of his estate, real and personal, after the death of said Louvicey, to the appellees, Ezekiel, Washington W., Estelle F. and Cornelia P.; that the said Fleming Farmer died on the 3d day of June, 1867; that his said will had been duly probated, and that the said Louvicey had elected to take under the same, and did, under the same, take possession of the estate thereby devised to her, and held and enjoyed it during her life, except the west half of the northeast quarter, and the east half of the northwest quarter of section 16, township 2 south, of range 10 west, in Gibson county, Indiana, containing one hundred and sixty acres; that the said Louvicey, together with the appellees, Ezekiel, Washington W., Estelle F. and Cornelia P., sold and conveyed the real estate above described to one John Ramsey, on the 20th day of November, 1869, for the sum of \$8,000, and that Ramsey paid Louvicey \$2,000 cash, and for the residue executed to her his promissory notes secured by mortgage on said real estate; that afterward said Ramsey sold said real estate to John Kell, who, in part payment of the purchase-money, assumed the payment of the notes given by Ramsey to said Louvicey for said land sold and conveyed by her and said appellees to him; that afterward, by an arrangement made by the said Louvicey with said Kell, she accepted the notes of Robert and James Brumfield in lieu of the notes of said Ramsey, which notes, so accepted, were secured by a mortgage on the land described in the complaint, except said town lots; that said Brumfields, being unable to pay said notes so given to said Louvicey, to save the cost of foreclosure conveyed said real estate to said Louvicey in payment of said notes; that the lots mentioned in the complaint as situate in the town of Francisco were purchased by the said Louvicey with the personal estate devised to her by the said Fleming Farmer for

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and during her life ; that the said Louvicey had no other title to said real estate than that above set out, and that she held the same in trust for the appellees, children of the said Fleming Farmer.

After making bequests to the amount of \$505, Fleming Farmer disposes of his estate as follows :

" Third. All the rest, residue and remainder of all my estate, both real and personal, I give, devise and bequeath to my beloved wife, Louvicey Farmer, for her sole use and benefit during her natural life, and at her death the same shall be equally divided between my children, Ezekiel Farmer, Estelle F. Farmer, Washington W. Farmer, and Cornelia P. Farmer; and if any of these children shall die, leaving a child or children, before the death of my said wife, then such child or children are to have all that part of the property left to my wife which would go to the deceased if still living. And the further privilege is accorded to my wife, if she should choose so to do, to divide all of said property, or such part as she may choose, between the said children during her lifetime."

The appellees, Ezekiel S. Farmer, Washington W. Farmer, Estelle F. Taylor and Cornelia P. Davis, also file a cross complaint, setting forth, substantially, the same facts alleged in the second paragraph of their answer, and insisting that they are the owners of the real estate described in the complaint, and that the appellants have no interest in the same.

The appellants demurred to the second paragraph of the answer, and to the cross complaint. The court overruled said demurrers. The appellants replied to the answer by a general denial, and answered the cross complaint also by a denial.

The cause was submitted to a jury for trial ; a verdict returned for the appellees. The appellants moved for a new trial. The motion was overruled.

The errors assigned are, that the court erred in overruling the demurrer to the second paragraph of the answer, and in overruling the demurrer to the cross complaint, and, also, in overruling the motion for a new trial.

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Fleming Farmer devised all his real estate to his wife, Louvicy Farmer, for life, and the remainder to his children, the appellees. The second paragraph of the answer states that a part of this land was sold by the joint act of the parties in interest, for the sum of \$8,000, \$2,000 of which was paid to the tenant for life, and the balance secured by the notes of the purchaser and a mortgage on the land sold, executed to Louvicy Farmer. The land described in the complaint, other than the lots in the town of Francisco, was conveyed to Louvicy Farmer, the tenant for life, in satisfaction of said notes and mortgage. There was no estimate made of the value of the life-estate in the land sold nor of the interests of those in remainder. The sale was not of the separate interest of each of the grantors; it was a joint sale, and the conveyance of the interests of all by the joint act of all, transferring the life-estate and the estates in remainder to the grantee. There is, therefore, no pretence for saying, as the appellants do, that it was a sale of the life-estate only of Louvicy Farmer, and that the purchase-money belonged to her. But the sale so made did not operate as a division and partition among the parties in interest of the fund produced by the sale. The fund will, in equity, be regarded as real estate, and stand for the land, the sale of which produced it. *Large's Appeal*, 54 Pa. St. 383.

The simple fact that the cash payment was made to the tenant for life, and the securities for the balance taken in her name, will not justify the inference that the remainder-men intended to give their interests in the land sold to the tenant for life. The proceeds of the sale will be regarded as the land itself, and as she was entitled to the possession of the land sold for life, so she would be entitled to the possession and use of the proceeds for life. It was proper, therefore, that the cash should be paid to her and the securities taken in her name.

Louvicy Farmer, as tenant for life, was entitled to the use of this fund as long as she lived, and as she had the legal title, by the will of her husband, to the land, the sale of which produced

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the fund, for her life, and the right to its possession, so she had the right to the possession of the fund during her life. But, while this was so, she became, under the circumstances, the trustee of those in remainder, and was bound as such to use the fund so as neither to endanger nor impair their rights. She was entitled to the legitimate and proper use of the fund, but she had no right to use it for the purpose of speculation. She could, of course, do as she pleased with the interest and income of the fund, but not with the fund itself.

No principle of equity is better settled than that where land is devised to a trustee for the use of one for life with remainder to another, it is the duty of the trustee to protect the rights of those in remainder as well as the interests of the tenant for life, and that, too, where the tenant for life is entitled to possession. It would seem logically to follow, that where equity impresses a trust upon the tenant for life in relation to the remainder-man's interest, he can not lawfully do anything with the fund which may endanger or tend to impair it.

If, then, as is alleged in the answer, the fund produced by the sale of the land devised by Fleming Farmer to Mrs. Farmer for life, with remainder to the appellees, was by her invested in the real estate in controversy, to whom, in equity, did the real estate belong? The fund itself, not the use of the fund, is in the land. Mrs. Farmer did not, in equity, own the fund; its use for her life alone belonged to her. There is no question of identity in the case. The answer avers, and the demurrer admits, that the land in controversy was purchased with the precise securities taken for the sale of the land devised by Fleming Farmer to Louvicey Farmer for life with remainder to the appellees. Had this fund been kept intact by the tenant for life, it would at her death have vested equitably in the appellees, the tenants in remainder. It would seem to follow, that, upon the death of Mrs. Farmer, the land purchased with this fund, representing and standing for it and for the land which produced it, vested, equitably, in

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the children of Fleming Farmer. Tiffany and Bullard, in their work on the law of Trusts and Trustees, p. 619, say :

“Where the tenant for life takes both the legal and equitable estate, the right of possession usually follows the title. But the *tenant for life*, in such case, is trustee for the remainder-men, and may be called to an account,” etc., and may be required in a proper case to give security for its safety.

Regarding the fund produced by the sale of the land devised by Fleming Farmer to his wife for life, with remainder to his children, as money, she became trustee for the appellees, and, having invested the trust fund in the land in controversy, the appellees may assert the same equitable right to the land which they could have asserted to the fund, had it not been invested. *Cook v. Tullis*, 18 Wall. 332 ; *Horry v. Glover*, 2 Hill Ch. 515.

It may be said, as it has been in one or two cases, that if the remainder-man can take the land purchased with the fund, he may receive a part of the benefit resulting from the use of the fund, by the tenant for life, to which he can have no right. To this it may be satisfactorily answered, that, where the tenant for life voluntarily makes such an investment, he ought not to be heard to say that the income of the land is more or less than the income of the fund. If more, he can not complain ; if less, he should not. By making the investment she may reasonably be presumed to have agreed to accept the income of the land in lieu of the profits of the trust fund.

Upon the facts stated in the answer and in the cross complaint, we think the land in controversy may be regarded as substituted for the land devised by Fleming Farmer to his wife for life, with remainder to the appellees. In the case of *Rapp v. Matthias*, 35 Ind. 332, one Starris, a citizen of Stark county, Ohio, devised all his estate, real and personal, to his wife for life, with power to sell, giving what might remain unconsumed at his wife's death, to his children. His executor sold his real estate, and with the proceeds purchased land in this State, in the name of the wife. Mrs. Starris, the

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tenant for life, undertook to dispose of the land so purchased by will. Her executor, in accordance with the will, applied to the court for an order to sell the real estate so held by Mrs. Starris at her death. The parties to whom Starris had given his real estate, after the death of Mrs. Starris, appeared to the petition. The court held that Mrs. Starris could not devise the land—that it came to others by the will of Jacob Starris, and was to be regarded as substituted for the land devised by him to his wife for life.

We think there was no error in overruling the demurrer to the second paragraph of the answer, nor in overruling the demurrer to the cross complaint. This disposes of all the questions raised, except that the verdict is not sustained by sufficient evidence.

The appellants insist that there was no evidence tending to show that Louvicey Farmer used any of the trust funds in purchasing the lots described in the complaint as situate in the town of Francisco. And in this we think the appellants were right. We have looked through the testimony carefully, and think that, fairly construed, it does not legally tend to show that the appellees had any interest in said lots, except what they inherited from Louvicey Farmer. True, one witness testified that Mrs. Farmer had nothing when she married Fleming Farmer. Another testified that she had nothing at his death, and another testified that she had no stock on the Brumfield farm; lived part of the time with her children, and lived well. But all the testimony showed that she was in the receipt of the income of a considerable estate from the death of her husband, in 1867; that Brumfield paid her interest to the amount of \$1,600 on the debt with which the farm in controversy was purchased, and that she had the income of nearly \$5,000, the residue of the personal estate of her deceased husband. The statements of the witnesses, as to her want of means at the time of her marriage and at the time of her husband's death, do not tend to prove her pecuniary condition in 1873, when the lots in Francisco were conveyed to her. Nor

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did the statements of the witness Brumfield, as to her manner of living. The lots seem to have been purchased for \$750, a sum which she could easily have accumulated from her income, and lived well. We do not think that the testimony, fairly construed, legally tended to show that she did not purchase these lots with her own means. The court below should have granted a new trial.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees.

No. 9933.

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79	537
153	219

CRIMINAL LAW.—*Estrays.*—*Conversion.*—*Indictment.*—*Motion in Arrest.*—*Statute Construed.*—An indictment charging that the defendant did, "on or about the tenth day of June, 1880," take up five stray sheep and "convert the same to his own use before the title to the said sheep had been vested in him according to law," is insufficient under section 50, 2 R. S. 1876, p. 475, as qualified by section 19 of "An act regarding estrays," etc., 1 R. S. 1876, p. 464, upon motion in arrest of judgment.

SAME.—*Indictment.*—*Averments.*—*Time.*—In such indictment, an averment that the animals were taken up on a day between the first day of November and the first day of April, or that they were found in the inclosure of the taker-up, is material to show that they were the subject of illegal conversion.

SAME.—*Statute Construed.*—In such case, time is essential and must be correctly laid and proved. The statute, 2 R. S. 1876, p. 475, section 50, does not cover cases of an illegal taking up.

SAME.—*"Convert."*—*Pleading.*—In such case, the word "convert" alleges a fact, the particulars of which need not be stated.

SAME.—*Certainty.*—It is the duty of the State to so frame an indictment as to apprise the defendant, with a reasonable degree of certainty, of the character of the charge preferred against him.

SAME.—*Transcript of Record.*—*"A True Bill."*—It is immaterial whether the words "A true bill," endorsed upon the indictment, appear in the record as written across it, or be copied into the transcript immediately after the indictment.

From the Fulton Circuit Court.

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J. S. Slick, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton*, *B. D. Crawford*, Prosecuting Attorney, and *E. Myers*, for the State.

ELLIOTT, C. J.—The only question presented by the record in this case is as to the sufficiency of the second count of the indictment upon which the appellant was tried and convicted.

The charging part of the indictment reads thus: "On or about the 10th day of June, 1880, at the county of Fulton and State of Indiana, the defendant did then and there take up five estray sheep, then and there being found, the property of one Martin L. Conner, of the value of \$3 each, and did then and there unlawfully, knowingly and wilfully convert the same to his own use before the title to the said sheep had been vested in him according to law."

It will be observed that the indictment does not charge the appellant with having taken up estray animals at a time prohibited by law. It will be further observed that it does not aver that the animals were taken up while within the enclosure of the accused. The charge is the unlawful conversion of estray animals.

The estray law contains this provision: "Nor shall any animal be taken up between the 1st day of April and the 1st day of November, unless the same be found in the enclosure of the taker up." 1 R. S. 1876, p. 464, section 19. The misdemeanor act in force when the offence was committed, and the indictment returned, contained the following provision: "If the taker up of estray property, shall suffer the same to be taken out of the county for more than three days at a time, or shall convert the same to his own use before the title thereto shall vest in him according to law," he "shall be fined not exceeding \$100 or imprisoned not exceeding six months." It is evident that this indictment was intended to allege the illegal conversion of estray property, and thus charge an offence under the provisions of the statute quoted. The offence is not well charged. It is very clear that the provision con-

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cerning the unlawful conversion of estray animals does not cover cases of an illegal taking up. The provision under immediate mention refers to cases where, by due process of law, the title may vest in the person taking up the estray. The phrase, "before the title thereto shall vest in him according to law," implies that the taker up may acquire title by conforming to, and proceeding in accordance with, the provisions of the estray law. It can not refer to cases where the animal is unlawfully taken up, for the reason that such person can not acquire title. An altogether different indictment from the present would be required to charge a violation of law by unlawfully taking up an estray animal.

The State insists that the time laid in this indictment is not material, and that evidence might have been introduced proving that the animals were taken up before the first day of April. It is the general rule, that time is not essential and need not be proved as alleged. There are, however, cases where time is essential and where it must be correctly laid and proved. *Clark v. The State*, 34 Ind. 436; *Effinger v. The State*, 47 Ind. 235; *State v. Caverly*, 51 N. H. 446. In this case time is essential. If the appellant took up the animals between the first day of April and the first day of November, he could not have been guilty of the offence sought to be charged against him. It was incumbent upon the prosecution to show that the act was done within a period of time which made it unlawful. It can not be inferred as against the averment of the indictment, that it was done at a time when it was criminal. If the time stated in the indictment, is the correct one, there is no guilt. It would be a subversion of all rules to presume it to be incorrect, or immaterial, for the purpose of holding that the appellant is guilty of a criminal offence.

It is the duty of the State to so frame an indictment as to apprise the defendant, with a reasonable degree of certainty, of the character of the charge preferred against him. An accused is entitled to a direct statement of the specific offence

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for which he is prosecuted. The indictment should not be in such form as to make it a matter of doubt what offence he must prepare to meet. It is not for the State in the present instance to insist that the indictment will bear the construction that one of two offences is charged. That question should have been set at rest by direct statements.

It is said that the allegation that the animals were estrays may be rejected, and still an offence be properly charged. It is true that mere surplusage may be rejected, but the allegation of the indictment is not mere surplusage. The charge attempted to be preferred is unquestionably a violation of the estray law, and it is necessary to show that the animals were estrays, and the allegation is, therefore, material. Material allegations, essential to the existence of an offence, can never be considered as mere surplusage.

Mere conversion of personal property, without a criminal intent, and not in violation of a statute, does not constitute a misdemeanor. The simple conversion of personal property may furnish ground for a civil action, but not for a criminal prosecution. If the allegations that the sheep were estrays, and were taken up by the appellant as such, were eliminated, there would be nothing charged against him except a mere conversion of personal property.

The record shows that the indictment was properly endorsed "A true bill," and that this endorsement was signed by the foreman of the grand jury. This was sufficient. It must affirmatively appear from the record, that the indictment was properly endorsed. It is not material whether the clerk writes the form of the endorsement across the indictment copied in the record, or copies it in the transcript immediately after the indictment. *Cooper v. The State*, ante, p. 206; *Beard v. The State*, 57 Ind. 8.

The allegation of conversion is sufficient. The State was not bound to allege the particular acts of conversion. Conversion, as here stated, is a fact, and indictments are required to state facts, not evidence.

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For the reasons first given, the indictment is bad, and the court erred in overruling appellant's motion in arrest of judgment.

Judgment reversed.

79	541
194	366

No. 9962.

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CRIMINAL LAW.—Forgery.—Indictment.—The general rule, that an indictment for forgery must set out the forged instrument according to its tenor, does not apply when the instrument, while in the defendant's possession, has been destroyed or so mutilated as to make this impossible; in such cases only the substance of the instrument need be stated; and this seems to be so though parol evidence, sufficient to supply the missing parts of the instrument, be at hand.

SAME.—Evidence.—That an instrument so mutilated while in the possession of the defendant has subsequently been rendered still more so, without design, by reason of the paper becoming brittle by burning when in his possession, is no objection to its admissibility in evidence on behalf of the State.

From the Switzerland Circuit Court.

J. D. Works, J. A. Works, R. B. Duncan, C. W. Smith and J. S. Duncan, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *E. G. Hay*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution against Gurley Munson, for forgery.

The indictment was in six counts. A motion to quash each count of the indictment, interposed by the defendant, was overruled. A jury returned a verdict of guilty as charged in the fifth and sixth counts of the indictment, fixing the punishment at a fine of one dollar and imprisonment in the State's prison for the term of two years. Judgment was rendered accord-

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ingly upon the verdict, a motion for a new trial being first overruled.

Error is assigned upon the overruling of the defendant's motion to quash the several counts of the indictment, but counsel have only argued the alleged insufficiency of the fifth and sixth counts upon which the defendant was convicted.

The fifth count charged, that on the 20th day of March, 1879, one William Spencer executed a promissory note for \$20, payable to the Copper and Cable Lightning Rod Company, on or before the 20th day of October, 1879, and delivered the same to the defendant as the agent for, and as a professed member of, said lightning rod company; that afterwards, on the 31st day of March, 1879, the defendant, at the county of Switzerland, in this State, and without the knowledge or consent of the said Spencer, did falsely, fraudulently and feloniously alter said promissory note in a material part thereof, by then and there inserting in the body of such note the words "one hundred and " immediately before the word "twenty" and the figures " $\frac{95}{100}$," immediately after the "twenty" and before the word "dollars," whereby said note was so altered and changed as to become what purported to be a note executed by the said Spencer to the lightning rod company above named, for the payment of the sum of one hundred and twenty dollars and ninety-five cents, instead of for the payment of twenty dollars, with the intent then and there and thereby to defraud the said Spencer; that afterwards said note was, by some person to the grand jurors unknown, so burned, blotted and blurred, and had thereby become so mutilated, that the grand jury was unable to set out the same according to its tenor, and to give more than the substance thereof, as in said count had been done.

The sixth count charged the defendant with having, on the 31st day of March, 1879, uttered and published the note described in the fifth count, and with having passed the same as genuine to one James Knox, after it had been so falsely, fraudulently and feloniously altered by him, the defendant, as in

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the fifth count alleged, and knowing the same to be forged, with the intent thereby to defraud the said Knox, stating merely the substance of the note, and not setting it out according to its tenor, and concluding with the averments, "that afterwards, to wit, on the 9th day of April, 1879, the said Gurley Munson procured the possession of said altered and forged note from the said James Knox, and while the same was retained in the possession and under the control of the said Gurley Munson, the words 'one hundred and,' which had previously been inserted therein as aforesaid, were erased and obliterated from said note, and portions of said note at and near the lower left-hand corner thereof, containing certain words and figures thereof, were blurred, mutilated and destroyed, and other parts of said note were blotted and blurred by some person or persons, to said grand jurors unknown, and that by reason thereof the said grand jurors are unable to set out herein accurately, and according to the tenor thereof, the contents of said promissory note either as it existed before, or as it existed after, the said fraudulent and material alteration thereof by the said Gurley Munson as aforesaid, and that further, by reason thereof, said contents can not now be ascertained by the inspection of said note, but can be shown only by parol evidence."

The objection urged to both of these counts of the indictment is, that neither one alleged a sufficient excuse for not setting out the note according to its tenor, and it is insisted that for that reason the motion to quash ought to have been sustained as to both counts.

It is a well recognized rule in criminal pleading, that, in prosecutions for forgery, the instrument charged to be forged must be set out in the indictment according to its tenor, so that the court may be able to judge of the character of the instrument and to determine whether it is one concerning which the crime of forgery may be committed. But when the instrument has been lost or destroyed, or is in the possession of the defendant, the substance of it need only be set out.

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State v. Atkins, 5 Blackf. 458 ; Bicknell Crim. Prac. 359, 360 ; Moore's Crim. Law, section 751, and notes ; 2 Archb. Crim. Prac. & Pl. 1567 ; 3 Greenl. Ev., section 107 ; 2 Russ. Crimes, 9th edition, 796 ; 2 Whart. Crim. Law, sections 1480 to 1485.

Both of the counts under consideration averred facts showing a partial destruction of the note charged to have been feloniously altered, and thus bringing this case within the spirit and meaning of the exception, named as above, in favor of instruments which have been destroyed when the indictment is returned.

In our opinion, therefore, both counts showed a sufficient excuse for not setting out the note according to its tenor, as the general rule requires in indictments for forgery.

It was made to appear at the trial that in April, 1879, a few days after he had regained possession of the note from James Knox, to whom it had been temporarily transferred as collateral security, the defendant gave the note to one Armstrong Hull for collection ; that Hull received twenty dollars soon afterwards in payment of the note from one John A. Spencer, a son of William Spencer, the maker, surrendering the note at the same time to the said John A. Spencer.

Hull testified that at the time he received the note from the defendant, it had much the appearance that it had at the time of the trial, except that the burned places did not seem so large, and that it was not so much crumbled ; that the printed matter was then legible, and was all in the note ; that he handed the note to the younger Spencer without any break in it ; that nothing crumbled off while in his possession.

The said John A. Spencer testified that when he paid the note and got possession of it, it was burned in places to a crisp, and otherwise blotted and blurred very much as it was at the trial, except that so much had not then dropped out of the burned places as had since seemingly crumbled out.

The note was thereupon offered in evidence on behalf of the State, and the defendant objected to its admission on the ground that it had not been shown that the note had been either blurred

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or mutilated while it was in his possession ; but the court overruled the objection, and permitted the note to be read in evidence. It is insisted that the court erred in the admission of the note in evidence.

Waiving all discussion of what might have been the correct practice under other circumstances, we think the fair inference from all the evidence was that the mutilation of the note resulted from something which occurred to it while it was in the possession of the defendant, and that the objection to the admissibility of the note in evidence was properly overruled.

At the time the note was read in evidence, the figures " $\frac{25}{100}$," were in the body of it, between the words "twenty" and "dollars."

But one witness testified to having read the note at the time it was temporarily transferred to Knox by the defendant. He stated that it then purported to be a note for \$120; that he did not remember having seen the figures " $\frac{25}{100}$ " in the note at that time; that he only remembered the note as a \$120 note, and that it was his best recollection that those figures were not then on the note.

The defendant also objected to the introduction of the note in evidence upon the ground that there was a variance between the note which had been transferred to Knox and that described in the indictment, but that objection was also overruled.

It was clearly shown that at the time of its execution and delivery to the defendant, the note did not contain the figures " $\frac{25}{100}$." It was also well established that at the time the note was presented to and paid off by John A. Spencer, it did contain those figures. The note was consequently admissible in evidence under the fifth count of the indictment which charged simply a felonious alteration by the defendant after its delivery to him. It becomes, therefore, immaterial to inquire whether the note might properly have been admitted under the sixth count alone.

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It is further insisted that the verdict was not sustained by sufficient evidence.

We will not attempt a review of the evidence, as no practical good could result from such a review. There was, what appears to us to have been, evidence fairly tending to sustain the verdict. Under such circumstances we are not permitted to disturb the verdict upon the evidence, where no error has been shown upon its admissibility at the trial.

Other questions were made and reserved upon the motion for a new trial, but what we have said practically disposes of all the questions discussed by counsel in their argument, and it is a well settled rule of practice in this court, that all questions made below, which are not noticed here, are impliedly waived.

No error has been shown in any of those portions of the record to which our attention has been directed.

The judgment is affirmed, with costs.

NIBLACK, J., has written this opinion in accordance with the views of a majority of the judges, and not as, in all respects, an expression of his own views of the case. He believes that the fair inference from the facts averred in the sixth count of the indictment was, that, with the assistance of perjured evidence, available for that purpose, the grand jury might have set out the note, charged to have been forged, according to its tenor, and that, under such circumstances, it was the duty of the grand jury to have so set it out; that consequently the excuse given for not setting out the note according to its tenor was an insufficient excuse, for which the motion to quash that count ought to have been sustained.

ELLIOTT, C. J., concurs in the views expressed by NIBLACK, J.

Catterlin v. The City of Frankfort.

No. 7934.

CATTERLIN v. THE CITY OF FRANKFORT.

CITY.—*Streets and Sidewalks.—Damages.—Liability of Author of Nuisance to Corporation.*—If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrong-doer as between itself and the author of the nuisance.

SAME.—*Contributory Negligence.—Complaint.*—In such case, there being no allegation that defendant had notice of such action against the city, the complaint of the corporation against the author of the nuisance must allege that the injured person was free from negligence contributing to his injury.

SAME.—*Estoppel.—Judgment.*—In such case, the defendant is not estopped by the judgment against the corporation from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident happened.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

O. E. Brumbaugh, W. R. Hines and J. Claybaugh, for appellee.

WORDEN, J.—Amended complaint by the appellee against the appellant, as follows:

“The plaintiff complains of the defendant and says, that prior to the 29th day of June, 1878, the defendant constructed in and upon a certain sidewalk within the town of Frankfort, in Clinton county, Indiana, which sidewalk was and is on the east side of Main street in said town, and extending there along north from Washington street in said town, a certain iron picket fence along and upon the edge of an excavation which said defendant had also dug and constructed; that from the time of said construction said defendant had kept and maintained said picket fence and said excavation in and upon said sidewalk in said town of Frankfort and in the city of Frankfort, Clinton county, Indiana, which was at the time of said construction the town of Frankfort, but now is, and was on said 29th day of June, and has been ever since, the city of Frankfort; that said defendant so erected, constructed

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and maintained said picket fence in and upon said sidewalk along the edge of said excavation, wrongfully and without the authority of said town (now city) of Frankfort; that on the said 29th day of June, 1878, in the night time thereof, one John D. Kersey, while passing upon and along said sidewalk, fell upon said picket fence and thereby sustained severe personal and bodily injury; that afterwards, to wit, at the October term, 1878, of the Clinton Circuit Court, the said John D. Kersey entered and instituted suit against the plaintiff, the city of Frankfort, for the damages he had sustained by falling upon said picket fence, and such subsequent proceedings were had in said court in said suit as that, on the ——— judicial day of said term of said court, the said John D. Kersey obtained a judgment in his favor against said city for damages on account of said injury, in the sum of \$300, and for the further sum of \$41.20 costs; that said city appeared and defended said action by her regularly appointed attorneys and by able and competent attorneys specially employed by her to assist in the defence of said action; that after the rendition of said judgment and before the bringing of this action, to wit, on December 7th, 1878, said city fully paid said judgment for damages and costs in the sum of \$341.20; that defendant is indebted to plaintiff on account of, and for the repayment of said damages and costs in the sum of \$341.20, and interest on the same at the rate of six per cent. per annum from the date of the payment of the same by said plaintiff, which amount is wholly due and unpaid. Wherefore," etc.

Demurrer to the complaint for want of sufficient facts overruled, and such further proceedings were had as that judgment was rendered for the plaintiff.

The question is presented, whether the complaint stated facts showing that the plaintiff was entitled to recover.

We quote section 1035, 2 Dill. Munic. Corp., 3d ed., containing a summary of the law applicable to the case:

"If a *municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalk:*

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or streets, it has a remedy over against the person by whose act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrong-doer, as between itself and the author of the nuisance; and if the latter had notice of the pendency of the action against the municipality, and could have defended it, he has been held to be concluded as to the existence of the defect or nuisance in the street, and as to the liability of the corporation to the plaintiff in consequence thereof, and as to the amount of damages or injury it occasioned. But although duly notified, he is not, says the Supreme Court of the United States, 'estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident happened.'"

As there is no allegation in the complaint that the defendant had notice of the action of Kersey against the city, and an opportunity of defending it, his liability is not shown to be established by the judgment.

In such case, in order to make the complaint good, it should at least show such a state of facts as would have made the defendant liable to Kersey, had the latter brought his action against the defendant instead of the city. This the complaint does not do. It does not allege in any manner that Kersey was free from negligence contributing to his injury. For this reason the complaint was insufficient.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

No. 7565.

STERNE v. THE BANK OF VINCENNES ET AL.

PRINCIPAL AND SURETY.—*Judgment.*—*Replevin Bail.*—*Abandonment of Lien by Return of Execution.*—*Consent of Creditor.*—*Release of Surety.*—Where a judgment is rendered against principals and sureties and an execution

79	549
125	508
79	549
125	508

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against the property of the judgment defendants issued thereon, and the principals have personal property within the jurisdiction of the officer having the writ, on which it might be levied, and the same is returned with the consent of the creditor, although no levy had been made, the sureties are released to the extent of the amount that might have been made by proceeding with the writ, and which can not afterward be made available.

SAME.—Consideration of Agreement.—Security of Judgment.—Where the security of a judgment appears to have been the real consideration of an agreement to extend the time of payment of the judgment and withhold execution, and the security has not been given, the trouble and inconvenience of the judgment defendants in procuring sureties to enter themselves as replevin bail do not constitute a sufficient consideration to support the agreement to extend.

From the Gibson Circuit Court.

J. E. McCullough, L. C. Embree, W. H. Trippet and M. W. Fields, for appellant.

F. W. Viehe, R. G. Evans and T. R. Paxton, for appellees.

MORRIS, C.—This suit was commenced in the Gibson Circuit Court, by the appellant against the appellees, for the purpose of being relieved from a judgment, taken in said court against Jacob W. Hargrove and Caleb Trippet, as principals, and the appellant as surety. The complaint is in four paragraphs.

The appellees severally demurred to each paragraph of the complaint. The demurrers were sustained, and final judgment rendered in favor of the appellees.

A cross complaint was filed by the bank against its co-appellees, Jefferson Turpin and John Sloan. The bank also filed a cross complaint against its co-appellees, William L. Hargrove, William M. Cockrum, James H. McConnell, Edward Rickard and John C. Blythe. These cross complaints were dismissed on the motion of the defendants to the same. The cross complaints are made a part of the record by bill of exceptions.

The rulings of the court upon the several demurrers to the complaint are assigned by the appellant as error, and the Vincennes National Bank assigns, as cross error, the dismissal of its cross complaint.

The first, second and third paragraphs of the appellant's complaint are the same as in the case of *Sterne v. McKinney*, *post*, p. 578. And, according to the rulings in that case, the court below erred in sustaining the demurrers to the first paragraph of the complaint. The demurrers to the second and third paragraphs were properly sustained.

We think the fourth paragraph of the appellant's complaint is substantially the same as the third. True, it is stated in the fourth paragraph that, by a contract made by the bank with Hargrove and Trippet, it agreed "that if the said Jacob W. Hargrove would procure one or more good and sufficient sureties to enter themselves bail for the payment of the one undivided half of said judgment, and if said Trippet would procure one or more good and sufficient sureties to enter themselves bail for the payment of the other half of said judgment, said bail to be accepted by the sheriff of said county, then said bank would extend the time of payment of said judgment, and withhold execution thereon, for the period of one year from said date of July 31st, 1875."

It is averred that this agreement was performed on the part of Hargrove and Trippet; that they procured the bail as stipulated, and that time was in fact given.

It is insisted by appellees' counsel, with much ingenious plausibility, that the question is not whether the contract of bail was valid or invalid as between the bail and the bank; that the real question is, was the agreement between the bank and Hargrove and Trippet based upon a sufficient consideration? That to procure the thing stipulated for to be done, caused Hargrove and Trippet some trouble, some inconvenience, and that such trouble and inconvenience constitute a sufficient consideration; that it was not necessary that any benefit should accrue to the bank. The argument is plausible, and, if such trouble and inconvenience constituted the real consideration contemplated by the contracting parties, it would be unanswerable. But it is quite obvious that this was not the consideration in the minds of the parties at the time

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the contract was made. It was not the purpose or intention of either of the parties to contract for this trouble or inconvenience. The security of the judgment was the real consideration, and the inconvenience mentioned was merely incidental to the actual consideration for the promise on the part of the bank. The trouble or inconvenience which may result from the doing of an act, which is the consideration of a promise, is something different from the consideration itself. The motive for the promise on the part of the bank was the securing of its debt, a real and substantial benefit, not the trouble or inconvenience which its attempted performance might occasion Hargrove and Trippet. The judgment not having been secured, the bank was at liberty at any time to take out execution upon it. It is not shown in this case that by the return of the execution any lien on the personal property of Hargrove and Trippet was lost. We think there was no error in sustaining the demurrer to this paragraph of the complaint.

Nor was there any error in dismissing the cross complaints filed by the bank. *Sterne v. The First Nat. Bank of Vincennes*, *post*, p. 560.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below, sustaining the demurrer to the first paragraph of the appellant's complaint, be reversed, at the costs of the appellee.

NIBLACK, J., was absent.

ON PETITION FOR A REHEARING.

MORRIS, C.—The Vincennes National Bank, one of the appellees, asks for a rehearing of this cause. The ground urged for a rehearing is thus stated in the petition:

"The court erred in its opinion in the conclusion, that when a judgment is rendered against principals and sureties, and an execution against the property of the judgment defendants issued thereon, and the principals have personal property within the jurisdiction of the officer having the writ, on which it might

be levied, and the same is returned with the consent of the creditor, although no levy had been made, the sureties are released to the extent of the amount that might have been made by proceeding with the writ, and which can not afterward be made available."

The counsel admit that the authorities are divided upon the above proposition, and that it is not without reason for its support, but they insist that the question is settled by the cases of *Jerauld v. Trippet*, 62 Ind. 122; *Hogshead v. Williams*, 55 Ind. 145; and *Lamb v. Trippet*, 64 Ind. 600.

The case of *Hogshead v. Williams* simply holds that the voluntary delay of a judgment plaintiff to take out execution on his judgment will not discharge the surety, though the principal judgment debtor had property out of which the judgment might have been satisfied had execution been issued. No lien had been acquired on the property of the principal debtor. It is the well settled law, and we know of no case to the contrary, that the creditor is not bound to active exertion to secure a lien upon the property of his principal debtor for the benefit of the surety. It is equally well settled, as a general rule, that, having secured such lien, the creditor is bound to retain it for the protection of the surety of his principal debtor. Brandt on Suretyship, sections 370, 371 and 372.

Under the law of Indiana, the execution from the time the officer receives it operates as a lien upon the personal property of the judgment debtor. By the issuing of the execution, the creditor has secured a lien on the property of his principal debtor, and there is nothing unreasonable or unjust in requiring him to retain and render the lien thus acquired available. To hold that the voluntary release of such a lien discharges the surety to the extent that he is thereby injured, is supported alike by reason and the general principles of the law, and affords the creditor no just cause of complaint.

But it is insisted that the case of *Jerauld v. Trippet*, *supra*, is this case, and that it decides the precise question here involved.

It is obvious that it was not so regarded by the distinguished

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judge who prepared the opinion. He says that the question in that case was decided in the case of *Hogshead v. Williams, supra*. It is clear that he regarded the question as one of delay merely—no mention being made of the lien acquired by the execution. The judge says:

“In the case we are now considering, there was no agreement to extend the time of the levy. It was a mere indulgence that could be countermanded at any moment, not founded upon any consideration; it did not change the obligation, and was not binding upon any person.”

The creditor's attorney told the officer not to levy the writ. No lien was abandoned, though the property was sold by the principal debtor while the execution was in the hands of the officer. The court regarded the directions given to the officer by the creditor's attorney as a mere delay, an indulgence which he might give his principal debtor without discharging his surety. In the case before us the lien acquired by the execution was abandoned. The question is not considered in the cases referred to, and is not, therefore, concluded by them.

The case of *Lamb v. Trippet* is disposed of by the simple statement that the questions are the same as those decided in *Jerauld v. Trippet*.

We think that the better reason and the weight of authority support the conclusion reached in this case, and that the petition for a rehearing should be overruled.

PER CURIAM.—Petition overruled.

79	554
136	603
79	554
164	451

No. 8269.

LEFEVER ET AL. v. JOHNSON.

EVIDENCE.—*Tax List.—Replevin.*—In a suit for the recovery of personal property, the tax list, sworn to by a party, showing no claim to the property, is admissible in evidence against him.

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SAME.—*Witness.—Discretion of Court.—Practice.*—It is no abuse of discretion for the judge, after a witness has been examined by the parties, to interrogate him concerning the state of his feelings towards the party against whom he has testified.

NEW TRIAL.—*Newly Discovered Evidence.*—Newly discovered evidence which is merely cumulative, i. e., of the same kind and to the same point, is no cause for a new trial.

SAME.—*Bill of Exceptions.—Affidavits.*—Affidavits in support of a motion for a new trial can come into the record only by bill of exceptions or order of court.

From the Marion Circuit Court.

P. Rappaport, for appellants.

B. F. Davis and *G. L. Taylor*, for appellee.

FRANKLIN, C.—Appellants sued appellee before a justice of the peace in an action of replevin for a horse and wagon.

On an appeal to the circuit court, judgment was rendered for appellee, over a motion for a new trial.

The only error assigned is the overruling of the motion for a new trial.

The first and second reasons in the motion for a new trial are, that the finding was not sustained by the evidence, and was contrary to law.

The testimony of appellee was directly in favor of the finding of the court, and however strong the preponderance of the evidence might be in favor of appellant, under the rule of decision adopted by this court, the conflict can not be weighed. The court below had the right to believe appellee, and, having done so, this court can not disturb the finding upon the preponderance of the evidence.

The third and fourth reasons stated are errors and irregularities occurring at the trial, and for newly discovered evidence.

That the court erred in admitting in evidence on the part of appellee the tax list of appellants for the year 1879, for the purpose of showing that the said property now claimed by appellants was not for that year listed by them for taxation.

We see no reasonable objection to the admission of this ev-

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idence. The list was a statement in writing, signed in the firm name and sworn to by appellants; it was made out under the direction of a public officer, in pursuance of a duty enjoined by law, and is competent evidence tending to show the amount and kind of property owned by the assessed at that time. *Painter v. Hall*, 75 Ind. 208.

Another irregularity complained of is, that during the trial one John Johnson, a son of appellee, testified on behalf of appellants, and, at the conclusion of his testimony, the court interrogated him as to the then existing state of feeling between him and his father. The appellants objected to the court's interrogating the witness, which objection was overruled by the court, and the witness answered, that he did not then live with his father, and that some time ago he had had a quarrel with him.

There is nothing wrong in the court's asking the witness any question the answer to which would likely throw any light upon his testimony.

Under the circumstances of this case, we see no abuse of the exercise of a fair discretion by the court.

The fourth and last reason for a new trial is based upon newly discovered evidence.

Appellant Hugo Lefever states in the motion for a new trial, which he verified, that the day after the trial he learned that he could prove by one Charles F. Cleaveland material facts for the plaintiffs. Cleaveland's affidavit is filed with the motion for a new trial, stating "that Johnson had told him on several occasions about six months ago or more, that they (Lefevers) were very kind to him; that they enabled him to do business; that the horse and wagon which he had belonged to the Lefevers, and was furnished to him so that he could carry on his business."

Upon the trial, appellant Hugo Lefever testified that appellants had bought and paid for the horse and wagon, and loaned them to appellee; they also proved by said John Johnson, that appellee had told him that they belonged to appel-

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lants. They also proved by James M. Tway, that, at the time the horse and wagon were taken by the constable under the writ of replevin, appellee admitted the horse and wagon belonged to appellants. They also proved the same admission by Mr. Carr. But appellee testified that he had bought and paid for the horse and wagon, had borrowed the money from appellants with which he paid for them, and had repaid to them a portion of the money ; that they never belonged to appellants, but had been his and in his possession ever since their said purchase.

Under this state of the evidence, can the newly discovered testimony of Cleaveland be considered anything more than cumulative testimony ?

It is a well settled rule of the law, that a new trial will not be granted for newly discovered cumulative evidence, and that rule applies to the testimony of a party the same as to any other witness. *Fox v. Reynolds*, 24 Ind. 46. Cumulative evidence has been defined to be evidence "of the same kind, and to the same point." *Winsett v. The State*, 57 Ind. 26, p. 29 ; *Zouker v. Wiest*, 42 Ind. 169.

The admission of a fact is not cumulative evidence to evidence of another kind tending to prove the fact. *Rains v. Ballow*, 54 Ind. 79, p. 82 ; *Humphreys v. Klick*, 49 Ind. 189, p. 193. On the trial of an action, where admissions of a party tending to show his liability in such action have been proved, proof of other admissions made by him, having the same tendency, is cumulative evidence. *Cox v. Harvey*, 53 Ind. 174 ; *Houston v. Bruner*, 39 Ind. 376, p. 384.

In 1 Greenleaf's Evidence, p. 4, section 2, the following language is used :

"Cumulative evidence is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admissions of the party, evidence of another verbal admission of the same fact is cumulative."

This same principle was endorsed and affirmed by this court in the case of *Shirel v. Baxter*, 71 Ind. 352.

Tumbleson v. Tumbleson.

From the foregoing authorities we think the newly discovered evidence proposed in the affidavit of Cleaveland is mere cumulative testimony. But if it were otherwise this newly discovered evidence is not in the record in a way that would authorize a reversal of the judgment for that reason. There is no affidavit of appellant in the record, except as contained in the sworn to motion for a new trial, and as therein contained it does not state the facts that he would be able to prove by Cleaveland; it only says that they could prove by him "material facts." This is not sufficient; he ought to have set out the facts. Then the affidavit of Cleaveland is not made a part of the bill of exceptions; and it could not properly get into the record in any other way, unless so ordered by the court. For both of the foregoing reasons this motion for a new trial, as based upon newly discovered evidence, is insufficient. And there was no error in the overruling of the motion for a new trial.

We find no error in this record.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is, in all things affirmed, with costs.

No. 2088.

TUMBLESON v. TUMBLESON.

DIVORCE.—*Alimony*.—The marriage was the seventh of the husband and the fourth of the wife. They lived together fourteen months. He had property worth \$2,500 and she a house and other property. She went away to visit a sick son, by a former marriage, and he to Missouri, and they remained apart; but before the separation she, without reason or excuse, refused to permit conjugal privileges. He had expended \$26 in repairing her house, allowed her to retain \$130 in household goods, and while

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they lived together he furnished her a comfortable support. A divorce was decreed to her for abandonment, with \$100 alimony.

Held, that the alimony was sufficient.

From the Huntington Circuit Court.

J. B. Kenner and J. I. Dille, for appellant.

H. B. Sayler and S. M. Sayler, for appellee.

BICKNELL, C. C.—This was a suit for divorce; the appellant filed a complaint for divorce on the ground of abandonment. The appellee filed a cross complaint, alleging that the plaintiff abandoned him; the appellant obtained a decree for a divorce with \$100 alimony, and she appeals from the alimony and claims she ought to have at least \$1,000.

The appellee is seventy-five years old and the appellant is his seventh wife, and he is her fourth husband.

They were married in August, 1876, and lived together until October, 1877, about fourteen months. She then went from Antioch, where they lived, to visit a sick son, by a former marriage, at Lafayette, and he went to Missouri, and they have not lived together since. The evidence shows that the appellee owns real estate of the value of \$2,500, and that the appellant has a house and other property of her own. It appears, also, that the appellee maintained his wife during the marriage very comfortably, and spent \$26 in repairs upon her property, and has permitted her to retain about \$130 worth of personal property, which was left by him at his home when he went to Missouri. Altogether, including the alimony, she will have received, besides a comfortable support, about \$250 for her fourteen months' residence with the appellee. Ordinarily, where a wife fulfils her obligations, and is divorced without her fault, she ought to receive as alimony more than \$100 where her husband's property is worth \$2,500. But the appellant did not fulfil her obligations as a wife. She refused to permit the appellee to exercise his conjugal rights to her person, without giving any reason or excuse therefor. Under such circumstances, the decree of the

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court below for alimony was large enough. There was no error in overruling the motion for a new trial. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 7562.

STERNE *v.* THE FIRST NATIONAL BANK OF VINCENNES ET AL.

PRACTICE.—*Pleading.—Counter-Claim.*—Where the facts set up in a cross complaint are in no way connected with, or dependent upon, the matters alleged in the complaint, no available error is committed in dismissing such cross complaint.

From the Gibson Circuit Court.

J. E. McCullough, L. C. Embree, W. H. Trippet and M. W. Fields, for appellant.

W. H. De Wolf, S. A. Chambers and T. R. Paxton, for appellees.

MORRIS, C.—The appellant commenced this suit against the appellees, to restrain the collection from him of a judgment taken against Jacob W. Hargrove and Caleb Trippet as principals, and the appellant and one Miller as sureties, by the appellee, The First National Bank of Vincennes, on the 2d day of February, 1875, for some \$5,000. The complaint contains three paragraphs.

The appellees severally demurred to each paragraph of the complaint. The demurrers were sustained, and final judgment rendered in favor of the appellees.

The rulings of the court upon the demurrers to the complaint are assigned by the appellant as errors.

The First National Bank of Vincennes filed a cross complaint against its co-defendants, Jefferson Turpin and John

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159 562

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Sloan, setting up the judgment against Hargrove and Trippet as principals, and Sterne and Miller as sureties, as the same is stated in the original complaint, the issuing of an execution on this judgment, and that, while it was in the hands of the sheriff, Turpin and Sloan became replevin bail for Trippet's half of said judgment, which was acknowledged by a recognizance endorsed on said execution, and approved by the sheriff; that said bank, in consideration that the said Turpin and Sloan had agreed to become such bail in manner and form aforesaid, agreed with them that it would extend the time for the payment of said judgment for one year, and return the execution then in the hands of said sheriff; that it caused said execution to be returned, and had in fact extended the time for the payment of said judgment for one year. The bank asked to recover against Turpin and Sloan the amount of its judgment against Hargrove, Trippet, Miller and the appellant.

The bank also filed a cross complaint against its co-defendants, William M. Cockrum, William L. Hargrove, James H. McConnell, Edward Rickard and John C. Blythe, who, it was alleged, had become bail for Hargrove's half of said judgment.

These cross complaints were dismissed on the respective motions of the defendants to the same. They are made a part of the record by a bill of exceptions.

The several paragraphs of the appellant's complaint are the same as in the case of the *Sterne v. McKinney*, *post*, p. 578; and, for the reasons given in the latter case, the same ruling will be made in this case. The demurrer to the first paragraph of the complaint should have been overruled. The demurrers were properly sustained to the second and third paragraphs.

The bank alleges as error the dismissal of its cross complaints. Assuming, though we do not so decide, that upon the facts stated, the bank would have a right to recover against the defendants to the cross complaints, the controversy would be one clearly at law, in no way connected with, or dependent upon, the matter alleged in the appellant's complaint. The

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facts did not constitute a cause of action by way of counter claim or cross complaint. There was no available error in dismissing the cross complaints.

The court erred in sustaining the demurrer to the first paragraph of the appellant's complaint, and for this error the judgment below should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below, sustaining the demurrer to the first paragraph of said complaint, be reversed, at the costs of the appellees.

NIBLACK, J., was absent.

Petition for a rehearing overruled.

No. 6797.

FAVORITE, GUARDIAN, v. SLAUTER.

GUARDIAN AND WARD.—*Action to Set Aside Settlement.—Complaint.*—A complaint by a guardian against a former guardian showed that the defendant received the sum of \$4,779.84 of his ward's money, that he filed his account in the proper court charging himself therewith and claiming credit for \$1,377.24, and that he had paid the plaintiff, his successor, \$1,159.47 cash and transferred to him a certain note secured by mortgage, "of the present value of \$2,243.13," which covers the whole estate, whereupon he was discharged by the court; that said note was in fact secured only by a junior mortgage on real estate, which was exhausted by the prior incumbrance, and the maker thereof was wholly insolvent, and had been prosecuted by the plaintiff to insolvency; that said account was fraudulent in this, that the defendant had appropriated to his own use of the ward's money said sum of \$2,243.13, and praying judgment that said account and decree of discharge be revoked, etc.

Held, that the complaint, having been filed within three years, was good on demurrer.

Held, also, that it need not show the appointment of the plaintiff as guardian.

From the Fountain Circuit Court.

L. Nebeker and S. M. Cambern, for appellant.

J. McCabe, for appellee.

Favorite, Guardian, v. Slauter.

WOODS, J.—The appellant, as guardian of the persons and estates of Jennie B. and Fannie E. Hollowell, minors, brought his complaint against the appellee, alleging in substance, the following facts, which the court held insufficient to constitute a cause of action, to wit:

That theretofore the defendant was appointed and qualified as the guardian of said wards, of whom the plaintiff is now guardian. That as such guardian the defendant received from various sources the sum of forty-seven hundred and seventy-nine dollars and eighty-four cents, the property of said wards, with which sum he charged himself in an account current filed in the Fountain Circuit Court on the — day —, 1875, showing in his hands \$2,389.92, moneys of his ward Jennie B., less a credit of \$829.17, and also \$2,389.92, moneys of his ward Fannie E., less a credit of \$548.07, and, in addition, filed his petition, showing the appointment of the plaintiff as his successor in said trust, to whom he had transferred "one note secured by mortgage given by Wilson L. Moore, the present value of which is \$2,243.13, and \$1,159.47 in cash, which covers the whole estate." That the said note was secured by a junior mortgage on real estate, which was entirely exhausted in payment of the senior incumbrance. That the plaintiff brought an action on said note and mortgage and obtained a personal judgment against said Moore and a decree of foreclosure of the mortgage, and had execution issued upon the judgment, which has been returned *nulla bona*. That Moore is wholly insolvent. That upon said account current and petition, on the — day of —, 1875, the defendant was discharged from his said trust as guardian by said court.

That the account and petition are fraudulent and wrongful in this, to wit: 1st. They show that the defendant has retained and now has the sum of \$2,243.13 in cash, belonging to said Jennie B. and Fannie E. Hollowell, and entirely fails and neglects to account for the same. 2d. They show that the defendant has wrongfully and fraudulently appropriated to his own use and benefit said \$2,243.13, the property of said

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wards. Wherefore the plaintiff asks judgment that said account current and petition and decree of the court therein made be revoked, and the same be made to show that the defendant had in his possession and unaccounted for, at the time of his discharge, the said sum of \$2,243.13, and that the court grant other proper relief.

The account current and petition referred to are set out at full length in the complaint, but need not be copied here.

We are of the opinion that sufficient facts are shown for setting aside the settlement made by the defendant and the order of the court for his discharge. The complaint was filed within a period less than three years after the settlement was made, and it shows that for \$2,243.13, money reported to be in the defendant's hands for his wards, he turned over to his successor a note, represented to be secured by mortgage and worth the amount named; that in fact there was a prior incumbrance which the land was taken to pay; that an execution issued upon a judgment obtained on the note had been returned *nulla bona*, and that the maker of the note was entirely insolvent. In short, for the money shown to be in his hands as guardian he turned over a worthless security which he represented to be of par value. This constitutes a *prima facie* case of imposition and deceit, for which the settlement ought to be set aside, and if, for any of the reasons suggested, the defendant was not in fact liable to account for money, but only for the note and mortgage themselves, it may be shown in defence.

The complaint is not defective because it does not show the the plaintiff's appointment.

The demurrer was also upon the grounds that the plaintiff had not the legal capacity to sue, and that there was a defect of parties plaintiffs, because the wards were not joined, but these points are not insisted on.

Judgment reversed, with costs, and with instructions to overrule the demurrer.

Graber, Guardian, v. Duncan.

No. 9005.

GRABER, GUARDIAN, v. DUNCAN.

DEED.—Taxes.—Covenant.—Accord and Satisfaction.—A stipulation in a deed of real estate by the grantor to pay certain taxes thereon is a personal contract with the grantee, and not a covenant running with the land; and an accord and satisfaction thereof to the grantee while he holds title discharges the contract, so that his vendee can not recover for its breach.

From the Clay Circuit Court.

W. V. Burns, for appellant.

NIBLACK, J.—On the 21st day of July, 1876, Samuel F. Duncan and Giles W. Duncan, for the expressed consideration of \$1,600, sold, and by warranty deed conveyed, to one Patrick O'Sullivan, a forty-acre tract of land in Clay county. The deed contained an express stipulation on the part of the grantor to pay all taxes and claims due on said tract of land up to the year 1876. On the 1st day of March, 1878, O'Sullivan conveyed the tract of land thus purchased by him, to Robert M. Catterson, by quitclaim deed. Giles W. Duncan died during the year 1878.

There was due upon and outstanding against this land on the 1st day of January, 1876, for taxes and penalty, interest and costs accrued thereon subsequently, the estimated sum of \$134.35, which it was alleged the Duncans, as well as the O'Sullivan, had thereafter failed to pay. After the land was conveyed to Catterson, William Graber, as his guardian, was compelled to pay, and did pay, that sum to the treasurer of Clay county, to prevent the sale of the land for unpaid taxes.

This action was brought by Graber, as the guardian of Catterson, against Samuel F. Duncan, the surviving grantor, to recover the amount of taxes so paid by him, the said Graber, as such guardian, upon a complaint alleging the facts set forth as above.

The defendant answered, admitting the execution of the deed, with the stipulation therein for the payment of taxes, as

Graber, Guardian, v. Duncan.

stated in the complaint, but averring that after its execution, that is to say, on said 21st day of July, 1876, he and the said Giles W. Duncan executed to O'Sullivan, their grantee, their promissory note for the sum of \$124.19, payable on the 1st day of November, 1876, in full satisfaction of the stipulation in the deed for the payment of taxes on the land conveyed; that afterwards, and while O'Sullivan was still the owner of such land, said note was fully paid to him, upon which the defendant was released from all further liability on said stipulation for the payment of taxes thereon.

The plaintiff demurred to this answer; but his demurrer was overruled, and he replied in general denial. A trial by the court resulted in a finding and judgment for the defendant.

Error is assigned upon the overruling of the demurrer to the answer, and that presents the only question to which our attention has been directed in the argument.

The appellant argues that the stipulation for the payment of taxes contained in the deed constituted a covenant running with the land, and for the payment of the taxes embraced within its provisions, to the treasurer of Clay county; that hence the payment of the amount of such taxes to O'Sullivan, even though he may then have been still the owner of the land, can not be construed to have been a payment of such taxes within the meaning of that stipulation.

An agreement to discharge an existing lien or incumbrance on the land conveyed, although contained in the deed, does not create a covenant running with the land. Such an agreement amounts ordinarily to a mere contract to do a particular thing, within a specified or a reasonable time, from a breach of which damages may result to the grantee, and not to a covenant annexed to or connected with the realty in such a way as to run with and be appurtenant to it. 2 Washb. Real Prop. 708; 2 Hilliard on Real Prop. 390; *The Junction Railroad Company v. Sayers*, 28 Ind. 318.

The stipulation on which this suit was based was consequently a merely personal covenant, which O'Sullivan had

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the right to insist upon the performance of within a reasonable time, or from the obligations of which he might have released the Duncans at any time while he remained the owner of the land to which the stipulation related.

The answer of the appellee set up an accord and satisfaction of the obligation assumed by him and his co-obligor to pay the taxes specified in the stipulation, and what was on their part a substantial compliance with their agreement to pay such taxes.

The facts averred showed that O'Sullivan, while continuing to be the owner, had received full compensation for the amount which the land was diminished in value by reason of the unpaid taxes which stood charged against it prior to 1876, and that was the fair equivalent of all he was entitled to demand of the Duncans under the stipulation. See *Spencer's Case* in 1 Smith's Lead. Cas. 115.

In our opinion, therefore, all right of action against the appellee, which might have accrued upon his stipulation to pay taxes, had been fully discharged before the plaintiff's ward became the owner of the land.

It follows that the demurrer to the appellee's answer was correctly sustained.

Whether, if the Duncans had not paid the taxes stipulated to be paid by them, the appellant's ward would have been subrogated to O'Sullivan's right of action against them, is a question we have not considered, and concerning which we have not assumed to decide anything in this case.

The judgment is affirmed, with costs.

No. 9060.

LEARY v. SHAFFER ET AL.

MARRIED WOMAN.—*Mortgage.—Bankrupt.—Judicial Sale.*—Where a wife joins her husband in executing a mortgage of his lands to secure his in-

79	567
126	491
79	567
126	462
79	567
133	263
79	567
148	290
79	567
162	270
79	567
168	127
168	128
168	136

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debtedness, and then he is adjudged a bankrupt, whereby her inchoate third of his lands becomes absolute under the statute, it is her right, upon foreclosure of the mortgage, to have a decree that the other two-thirds be first sold, if it appear that such two-thirds is of value sufficient to discharge the debt. (The case also construes an order entered by the bankruptcy court, for which see opinion.)

From the Hancock Circuit Court.

T. S. Rollins, G. W. Stubbs and M. Marsh, for appellant.
J. A. New and C. E. Barrett, for appellees.

ELLIOTT, C. J.—On the 11th day of October, 1877, the appellant joined with her husband in the execution of a mortgage upon real estate to the Indiana National Bank to secure a debt owing to the bank by him. This mortgage passed by assignment to the appellee Shaffer, who instituted an action of foreclosure in 1878, and in October of that year secured a decree. Sale was made on the decree and the appellees New and Shaffer became the purchasers. Prior to the commencement of the foreclosure suit, the husband was adjudged a bankrupt and all of his property conveyed to an assignee. The assignee was not made a party to the foreclosure suit, but the appellees, after their purchase at the sheriff's sale, filed a petition in the United States District Court against the assignee and the appellant's husband, praying an order directing the execution of a conveyance to them. An order was entered granting the prayer of the petition and directing that the petitioners Shaffer and New should appear to any petition which might be filed by the appellant in the Hancock Circuit Court and consent that the proceedings in foreclosure should be opened and reviewed. The facts detailed were set forth in a petition or complaint filed by the appellant, and by an amendment subsequently made she alleged that she is the owner of the one undivided third part of the land; that the land is of the value of \$9,750; that two-thirds of the land is amply sufficient to pay the mortgage debt and will sell for a sum sufficient to pay it, and that she executed the mortgage as the surety of her husband.

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The court below sustained a demurrer to the complaint, and upon this ruling error is assigned.

The Hancock Circuit Court had jurisdiction of the subject-matter of the foreclosure suit, but as the assignee in bankruptcy had succeeded to the equity of redemption of the bankrupt mortgagor the judgment was void as to him, because he was not a party to the action. This was so adjudged, upon the appellee's petition, by the district court, and is the declaration of a familiar rule of law. It has been many times decided by this court, that the owner of the equity of redemption must be made a party defendant to the action to foreclose, or no valid decree can be rendered. The district court had jurisdiction of the bankrupt and his estate, and had authority to make the order which the petition of the appellees induced it to enter, and in doing this did not disregard any valid judgment of a State court. This judgment of the United States Court can not be collaterally questioned. It follows, therefore, that the order made by the district court sending the case to the circuit court is valid and effective, and that, as the circuit court possessed general jurisdiction of the subject-matter of the foreclosure suit, it had authority to consider and determine the right of the appellant to relief from the original judgment of foreclosure.

It is urged that Mrs. Leary was not a party to the proceeding in the Federal court, and can not take the benefit of its judgment. The appellees are not in a situation to push aside her rights in defiance of an order made upon their own petition. Their decree was invalid because the owner of the equity of redemption was not a party to the foreclosure suit. They asked the court having jurisdiction in bankruptcy matters to validate it. This request the court granted, but upon designated terms, and upon these terms the appellees must accept the relief awarded them or not at all. They can not avail themselves of the benefit of the order, and disregard the conditions upon which it was granted.

This is not an ordinary bill of review. The district court

Leary v. Shaffer et al.

directed the appellees to consent to a judicial investigation of the rights of the appellant. This direction was made upon the appellees' petition invoking the aid of that court, and it was made a condition of the relief granted them, that they should consent to an investigation. This was the conclusive judgment of the court to which appellees had appealed, and, as that judgment can not be impeached, it fetters them. If the district court had jurisdiction, as unquestionably it had, to order the assignee to either convey or abandon the mortgaged property, it had power to settle all incidental matters. Appellees, having secured that judgment, must abide by it, not merely as to so much of it as pleased them, but to the whole judgment, the bitter as well as the sweet.

The inchoate right of the appellant in the lands of her husband was transformed into a vested one by the conveyance to the assignee in bankruptcy. *Ketchum v. Schicketanz*, 73 Ind. 137; *McCracken v. Kuhn*, 73 Ind. 149; *Roberts v. Shroyer*, 68 Ind. 64; *Lawson v. DeBolt*, 78 Ind. 563. The mortgage which she had joined in executing became a lien on this vested interest. *Graves v. Braden*, 62 Ind. 93; *Hoadley v. Hadley*, 48 Ind. 452. Where the wife's interest is merely inchoate when the mortgage is executed, but afterwards becomes vested, the lien is fastened upon the greater estate. This must necessarily be so, for the inferior estate disappears when the greater comes into existence.

When the right to enforce the mortgage matured, the wife's interest was a distinct and vested one. She had a right to partition against others than the mortgagee, for it is shown by the cases first cited, that, upon the conveyance to the assignee in bankruptcy, the rights of the wife became so fixed as to entitle her to have one-third of the land set off to her in severalty. The interest she then acquired would make the land her own separate property, not, of course, divested of the lien of the mortgage, but as against all other persons than the mortgagee.

It is settled that a wife who executes a mortgage upon her separate property for her husband's debt is to be regarded as

a surety. An author, justly praised for his accuracy, says: "A wife who has mortgaged her separate property for her husband's debt is in the position of a surety, and her liability and the mortgage lien is discharged by the extension of time of payment without her consent, if the extension be a binding obligation upon the mortgagee." 1 Jones Mortgages, sec. 114. The same principle is laid down by Brandt, in his work on Suretyship. But this principle does not fully meet the question here presented, for the property was not the wife's when the mortgage was executed, and in such cases a different rule obtains, and the wife is not a surety. Brandt Suretyship, section 22. As the appellant was not a surety when the mortgage was executed, her rights can not grow into those of a surety as against her mortgagees. We can not, therefore, regard her as a surety in the strict sense of the term, although she surely does occupy a position closely analogous to that of a surety.

The wife undoubtedly has some equity even while her right is purely an inchoate one. This is so or a long line of decisions must be overthrown, for it has been held again and again that she may redeem from the mortgage. The rule goes further; she must be made a party to the action of foreclosure even where the mortgage is for purchase-money or her right to redeem is not barred. *May v. Fletcher*, 40 Ind. 575. Is this equity strong enough to entitle her to require the mortgagee to first offer for sale the part of the land in which she has no interest, before resorting to that in which she has an interest? In other words, is she not entitled to an order requiring two-thirds of the land to be offered for sale before offering the whole? If analogous cases are followed to their logical results, there can be no difficulty in declaring that the wife has a right to an order requiring two-thirds of the land to be first offered for sale, where it appears, as it does here, that the two-thirds will be amply sufficient to discharge the indebtedness. But it is said this question is settled the other way by our own adjudications. The cases referred to as being decisive of this question are *Haggerty v.*

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Byrne, 75 Ind. 499, and *Jackman v. Nowling*, 69 Ind. 188. The first of these cases decides that the wife is not entitled to have the land freed from the mortgage, and in this follows the second of the cases cited. So that all that really is adjudicated by either of these cases is, that the interest of the wife still remains subject to the mortgage. In neither of these cases was the question the same in principle or in effect as that which we have here. It must be constantly borne in mind that there is here no attempt to free the land from the mortgage lien, no claim that the appellees have not a right to a foreclosure, no assertion of title adverse to the mortgagees. What is asked, and all that is asked, is, that the decree shall direct the appellees to first offer for sale the two-thirds of the lands. The cases cited do not decide the question which here confronts us, and we are free to seek and declare a rule which will do equity and secure justice.

It has been already demonstrated that the wife has some equity even while her right is purely inchoate, and it only remains to enquire and determine whether it is strong enough to secure the relief she seeks. In *Perry v. Borton*, 25 Ind. 274, a widow claimed that an administrator should use assets in his hands to pay off a mortgage in which she had united with her husband in executing, and her claim was enforced. The case of *Newcomer v. Wallace*, 30 Ind. 216, declares a like doctrine; and so does, in a very emphatic way, the case of *Hunsucker v. Smith*, 49 Ind. 114. Very strongly in point is the case of *Medsker v. Parker*, 70 Ind. 509, wherein it is held, that, where the interests of husband and wife have been severed, the interest of the former in the mortgaged property should be decreed to be first sold.

If it be true, as counsel think, that the language in *Haggerty v. Byrne* discredits the holding in the case under direct mention, then the language is not approved; but we do not think the interpretation placed upon it by counsel is quite correct. The latest case upon this subject, that of *Bales v. Hunt*,

77 Ind. 355, is in full harmony with the principle declared in *Medsker v. Parker*.

It is said by an author already quoted, that "Moreover she" (the wife) "is entitled to have her estate exonerated out of the estate of her husband if this be practicable. When he has mortgaged or pledged his own property for the same debt, his property should in the first instance be applied to satisfy the mortgage." 1 Jones Mortgages, sec. 114. According to the admitted allegations of the complaint, it is practicable to exonerate the wife's estate by selling the husband's, and it is equitable to do this, for the debt is his, not hers.

If the whole mortgaged premises had been sold, and a surplus had remained after full satisfaction of the mortgage, the wife would have been entitled to her share of the surplus. In such cases the surplus is real property if sale is made after her rights vest. *Dunning v. Ocean Nat'l Bank*, 61 N. Y. 497, and cases cited. It is well settled that a surviving wife of a deceased mortgagee has an interest in the equity of redemption, but that she must share in the burden of redeeming. 2 Jones Mortg., sections 1693 and 1694; 1 Jones Mortg., section 666. This is so because she has an estate in the land, and, if she has this, can any reason be imagined why she should not be allowed to compel at least an offer to sell the estate which belongs to another, even though that other is the estate of her deceased or bankrupt husband? If she is entitled to a share of the surplus, she certainly has a right in the first instance to preserve her own estate, by having that belonging to another first offered for sale. It is a familiar rule, often lauded and frequently applied, that where there are two parcels of land of one of which a third person has become the purchaser since the execution of a mortgage, or where one of two parcels covered by the same mortgage is owned by a surety, the mortgagee may be compelled to first offer for sale that in which the mortgagor retains his interest. The principle upon which that rule is grounded applies to a case like the present.

The right of the wife is not to assert title against the mort-

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gagee, but to assert a right to redeem. *Kissel v. Eaton*, 64 Ind. 248. It is nevertheless a substantive right, carrying with it some equities, and we think the equities are of strength sufficient to entitle her to have an order incorporated in the decree directing an offer to be first made of the husband's interest in the land. In asking such an order, she neither impugns the validity of the mortgage nor lessens the mortgagee's security; for, if the two-thirds will not sell for a sum sufficient to pay the mortgage, then the remainder must be sold.

No legal injury can result to the mortgagee if part of the land will satisfy the debt. He has no right to the land; he holds it merely as security, and if part will pay his debt a part is all he is in equity and good conscience entitled to sell; if part will not sell for enough, then he has a perfect and undoubted right to sell all the land his mortgage covers. A slight thing only is required in compelling him to first make offer of part of the mortgaged land.

The judgment of the Federal court does not, fairly interpreted, mean that the appellant shall defeat the mortgage; it simply means that if she shows some right to relief it shall be awarded her. A person owning an interest in mortgaged property and showing that he is entitled to have a part of the property in which he has no interest first offered for sale, shows some right to relief. The complaint of the appellant does this, and is therefore clearly within the order which appellee's petition obtained from the United States District Court. The part of the order which bears upon this question reads thus: "Such decree and the sale made thereunder shall be opened and reviewed so far as to permit said Margaret Leary to make any defence or ask and obtain any relief to which she may be entitled in said cause, as fully as if said decree had not been rendered." We think there is little room to doubt the meaning of this provision.

Judgment reversed.

Butler v. Haines.

No. 8527.

BUTLER v. HAINES.

SCHOOL LAW.—*Contract.—Unlicensed Teacher.—Township Trustee.*—A valid contract for the teaching of a public school can not be made by a township trustee with one who at the time has no license to teach, and the subsequent procurement of a license does not validate the contract.

SAME.—*Liability of Township Trustee.*—If a township trustee, contrary to contract, removes a teacher from the charge of a public school, he is not personally liable to the teacher for breach of the contract.

From the Grant Circuit Court.

G. W. Harvey, for appellant.

A. Steele and R. T. St. John, for appellee.

WOODS, J.—The appellee sued the appellant, charging, in substance, that, being the trustee of Van Buren township, in Grant county, the appellant made a verbal contract with the appellee to teach for six months from September 29th, 1879, in one of the schools of the township; that it was understood that the contract should be reduced to writing in the near future; that in pursuance of the contract the defendant gave notice that the school would commence on September 29th, 1879, and on that day put the plaintiff in possession of the school house, and the plaintiff began and continued to teach for two weeks, when the defendant ousted the plaintiff from the house and refused to permit him longer to teach the school, though the plaintiff has been and continued ready to perform the contract on his part; that the plaintiff was duly licensed to teach a six months school by the superintendent of said county.

The complaint was not demurred to, but, after the overruling of his motion for a new trial, the appellant moved in arrest of the judgment, which motion the court overruled.

The evidence is in the record, and shows clearly that the plaintiff had no cause of action, either against the appellant individually or against the school township. The law forbids the making of a contract with any one to teach, who is not at

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the time licensed to teach. The appellant had no license when the contract was made, if one was made, and the fact that the defendant put him in possession of the school house, and permitted him to teach under the void contract, gave it no validity or additional force, and it is not pretended that, after the appellee obtained a license, any new contract was made, either expressly or by implication.

It is claimed that the appellee had a license which was stolen from him at Muncie. But there is no evidence that he had any license at all, and certainly none that he had a license to teach in Grant county. There is evidence that he told the appellant that he had a license, which was stolen from him at Muncie, but that he in fact had a license, or what for, or by what officer issued, and whether yet in force, there is no evidence. That the teacher must have a license when the contract is made, see *Putnam v. School Town of Irvington*, 69 Ind. 80.

Something has been said upon the proposition that a teacher's contract must be in writing, but we leave that question unconsidered.

If there had been a valid contract, it was not with the trustee personally, and he is not liable personally for a failure to perform it. *Morrison v. McFarland*, 51 Ind. 206. If, therefore, the complaint shows any cause of action against him, it is not on account of his failure to perform the contract, but it must be on the ground that he tortiously and forcibly interfered with the plaintiff in performing his contract with the school township.

The evidence shows no such interference. The appellant demanded the keys of the school house of the appellee, and under protest the appellee gave them up. If this furnishes a cause of action, it is for a breach of the contract, and lies against the township, not against the trustee in his individual capacity.

Judgment reversed, with costs.

 Spraker et al. v. Armstrong et al.

No. 9714.

SPRAKER ET AL. v. ARMSTRONG ET AL.

79	577
143	204
79	577
144	606

SPECIAL VERDICT.—*Special Finding.*—*New Trial.*—Where a special verdict does not find upon material facts established by the evidence, the remedy is by a motion for a new trial; and where a special finding or a special verdict is silent upon a point, it is equivalent to a finding upon that point against the party who has the burden of the issue; and if the point is sustained by the evidence, the finding is wrong and the party injured is entitled to a new trial.

SAME.—*Venire de Novo.*—The office of a special verdict or a special finding is to find the facts which have been proved, but the failure to find these facts is not a defect on the face of the finding or verdict to be reached by a motion for a *venire de novo*. But where such verdict or finding is on its face defective or imperfect, a motion for a *venire de novo* is proper.

From the Howard Circuit Court.

J. O'Brien, C. N. Pollard and C. C. Shiveley, for appellants.
J. F. Vaile and R. Vaile, for appellees.

ELLIOTT, C. J.—This case is very similar to that of *Ricketts v. Spraker*, 77 Ind. 371, and is in a great measure governed by the decision made in that case. The litigation grows out of the same subject-matter, and it is unnecessary to restate the questions decided in the former case. Under the decision the complaint of the appellees is bad, and several of the answers to which demurrers were sustained are good, and the court erred in overruling the demurrers to the complaint and in sustaining demurrers to the answers.

There are however some questions in this case which were not presented in the one decided, and it is proper that they should be decided, since counsel request that it may be done.

Counsel inquire, What is the remedy where a special verdict does not find upon material facts established by the evidence? The answer to this is, by a motion for a new trial. If the verdict does not find all the material facts proved, it is contrary to the evidence. *Ex Parte Walls*, 73 Ind. 95. Where a special finding or a special verdict is silent upon a point, it is equiv-

Sterne v. McKinney et al.

alent to a finding upon that point against the party who has the burden of the issue. *Vannoy v. Duprez*, 72 Ind. 26. If, therefore, the point is sustained by the evidence, the finding is wrong and the party injured is entitled to a new trial.

Since the decision in *Graham v. The State, ex rel.*, 66 Ind. 386, the rule has been that the office of a special verdict or a special finding is to find the facts which have been proved. The failure to find these facts is not a defect on the face of the finding or verdict to be reached by a motion for a *venire de novo*.

Where the special verdict or the special finding is on its face defective or imperfect, a motion for a *venire de novo* is proper. *Kealing v. Vansickle*, 74 Ind. 529; *Brickley v. Weghorn*, 71 Ind. 497; *Peed v. Brenneman*, 72 Ind. 288.

The special verdict in this case is silent upon several material points upon which appellants had the burden, and is, therefore, against them on these points. There was evidence fully proving these points, and appellants' motion for a new trial is well supported.

Judgment reversed.

79 578
138 386

No. 7563.

STERNE v. MCKINNEY ET AL.

REPLEVIN BAIL.—*Judgment.*—*Stay of Execution.*—*Principal and Surety.*—*Release of Surety.*—*Agreement.*—*Lien.*—Where a creditor by judgment against two or more, one of whom is principal debtor and the others are sureties, so adjudged in the cause, causes a return of his execution in consequence of the entry of replevin bail, which is invalid as such, thereby discharging a lien of the execution on personal property of the principal sufficient to satisfy the judgment, the surety is injured thereby, and he is discharged *pro tanto*. But it is otherwise if the sheriff return the execution of his own accord, or if, in consequence of such invalid replevin bail, the creditor agrees with the principal debtor to a stay and return of

Sterne v. McKinney *et al.*

execution upon the consent of the original sureties being obtained, and they do consent, though without knowledge that such agreement had been made by the creditor, and no lien on property is lost by the return. **SAME.**—*Recognizance for Part of Judgment.*—*Void Execution.*—A recognizance of replevin bail for less than the whole of a judgment, interest and costs, is not authorized by statute, and is void as such (R. S. 1881, sections 690, 691 and 697). *The Vincennes National Bank v. Cockrum*, 64 Ind. 229, on this point overruled.

From the Gibson Circuit Court.

J. E. McCullough, L. C. Embree, W. H. Trippet and M. W. Fields, for appellant.

W. H. De Wolf, S. N. Chambers and T. R. Paxton, for appellees.

MORRIS, C.—This suit was commenced by the appellant against the appellees. The complaint contains three paragraphs.

The first states, that on the 2d day of February, 1875, Ulysses Hibbard, since deceased, and the appellees, Richard J. McKinney, Peter E. La Plant, Henry S. Cauthorn, William Hibbard and Hiram A. Foulks, recovered in the Gibson Circuit Court a judgment against the appellant and Jacob W. Hargrove, Caleb Trippet and Richard M. J. Miller, for the sum of \$3,183.50. That the appellant and said Miller were, upon their proper cross complaint, adjudged to be the sureties of said Hargrove and Trippet, and that it was provided in said judgment that the same should be first levied of property of Hargrove and Trippet as principal debtors. It is further averred, that on the 10th day of March, 1875, an execution was duly issued on said judgment and placed in the hands of the sheriff of Gibson county. That while the execution was in the hands of the sheriff, and just before the time allowed by law for the stay of execution had expired, the judgment plaintiffs agreed with Hargrove and Trippet, the principal judgment debtors, that if they would procure one or more good and sufficient sureties for the payment of said judgment to enter themselves as guarantors or bail for

Sterne v. McKinney et al.

the payment of said judgment, the judgment plaintiffs would extend the time for the payment of the same for a period of one year from the 31st day of July, 1875, and that they would not issue, or cause to be issued, an execution on said judgment within said time. That, in pursuance of said agreement, said Hargrove and Trippet, on the 31st day of July, 1875, being on the 180th day from the rendition of said judgment, procured the appellees William L. Hargrove, William M. Cockrum, James H. McConnell, Edward Rickard, and John C. Blythe, to acknowledge themselves replevin bail for the payment of the said Jacob W. Hargrove's one-half of said judgment, together with the interest and costs accrued and to accrue thereon at or before the expiration of the time allowed by law for the stay of execution upon said judgment; that, at the same time, said Hargrove and Trippet procured the appellees, Jefferson Turpin and John Sloan, in like manner, to acknowledge themselves replevin bail for said Trippet for the payment of his one-half of said judgment. That said acknowledgments of replevin bail, signed by said parties were endorsed upon said execution issued on said judgment and approved by the sheriff then having the same in his hands for collection, and that said bail was accepted by the judgment plaintiffs; that said bail was good and sufficient. A copy of the execution, and bail pieces endorsed thereon, is filed with the complaint. That said execution was returned and no other execution issued on said judgment until after the expiration of one year from the 31st day of July, 1876, and that during said year the said Hargrove and Trippet sold and disposed of a large amount of personal property, owned and possessed by them in said county, at the beginning of said year and at the time said execution was issued, all of which was liable to be levied upon and sold on execution, out of which said judgment might have been fully paid and satisfied. That said contract between said judgment plaintiffs and Hargrove and Trippet was made without the knowledge or consent of the appellant. It is further averred, that on the 6th day of April,

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1877, the judgment plaintiffs caused an execution to be issued on said judgment and delivered to Jacob G. Vail as sheriff of said county, who has levied the same upon the lands of the appellant, of the value of \$15,000. That, by reason of the acts and agreement of the judgment plaintiffs, the appellant is released from said judgment. He prays that the levy may be set aside and the parties forever enjoined from enforcing said judgment as against him.

The second paragraph of the complaint states the judgment recovered and the suretyship of the appellant and Miller, as set forth in the first paragraph. Omitting the agreement between the judgment plaintiffs and Hargrove and Trippet as to replevin bail, as stated in the first paragraph, it set out the entries of bail by the same parties and in the same manner stated in the first paragraph; one set becoming bail for Hargrove's half of the judgment, and the other for Trippet's half. That there was, at the time the bail was entered, an execution on said judgment in the hand of the sheriff, upon which the bail pieces were written; that it was returned, and that after the expiration of a year another execution was issued on said judgment and levied by the sheriff, to whom it was delivered, on the land of the appellant. It is also averred that, at the time the last execution was issued, the replevin bail had property subject to execution in said county. The prayer is, that the levy be set aside, and the judgment plaintiffs required to exhaust the property of the replevin bail before taking or levying upon the property of the appellant.

The third paragraph contains substantially all the facts stated in the first, except that it avers that the judgment plaintiffs agreed that if Hargrove would procure one or more good freeholders to acknowledge themselves bail or surety for the payment of one-half of said judgment, and if said Trippet would procure one or more good and sufficient freeholders to acknowledge themselves bail or surety for the payment of the other half, the bail or sureties to be accepted by either the sheriff or judgment plaintiffs, and if the appellant consented

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to an extension of time for one year for the payment of the judgment, then the said judgment creditors would extend the time of payment for one year from the 31st of July, 1875. It is then averred, that Hargrove and Trippet performed said agreement on their part, and that the judgment creditors as well as the sheriff accepted and approved the bail; that on the 3d day of August, 1875, the appellant being ignorant of the fact that any agreement had been made for the extension of the time for the payment of said judgment, the judgment plaintiffs, knowing that he was so ignorant, procured him to sign a writing consenting to the extension of the time for payment of the judgment for a period not exceeding a year, but that Miller, the other surety, did not know of such agreement to extend the time of payment, and never consented to any extension. Nothing is said as to the property of Hargrove and Trippet. In other respects, the third paragraph is the same as the first.

The appellees severally demurred to each paragraph of the complaint. The demurrers were sustained, and the appellant electing to stand by his complaint, judgment was rendered for the appellees.

The rulings of the court upon the several demurrers are assigned as errors.

The recognizances of bail endorsed on the execution are as follows:

"We acknowledge ourselves replevin bail for the payment of Jacob W. Hargrove's one-half of the judgment upon which the within execution has issued, together with the interest and costs accrued and to accrue thereon, at or before the expiration of the time allowed by law for the stay of execution on such judgment. July 31st, 1875. WILLIAM M. COCKRUM,

"WILLIAM HARGROVE,

"J. H. McCONNELL,

"EDWARD RICKARD,

"J. C. BLYTHE."

"Taken and approved by me, July 31st, 1875.

"F. W. HAUSS, Sh. G. Co."

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"We acknowledge ourselves replevin bail for Caleb Trippet for the payment of the undivided half of the judgment upon which the within execution has issued, together with the interest and costs accrued and to accrue thereon, at or before the expiration of the time allowed by law for the stay of execution on such judgment. July 31st, 1875.

"JOHN SLOAN,

"JEFFERSON TURPIN."

"Taken and approved by me, July 31st, 1875.

"F. W. HAUSS, Sh. G. Co."

It is, we think, quite clear that the above recognizances are not in conformity to the statute in relation to the stay of execution upon judgments. Section 420 of the code, 2 R. S. 1876, p. 201, provides that "When judgment has been rendered against any person for the recovery of money or sale of property, he may, by procuring one or more sufficient freehold sureties, to enter into a recognizance, acknowledging themselves bail for the defendant for the payment of the judgment, together with the interest and costs accrued, and to accrue, have a stay of execution."

Section 421 provides that "The undertaking in the recognizance shall be for the payment of the judgment, interest, and costs that may accrue at or before the expiration of the term of the stay of execution."

Section 427 provides that such recognizance "shall have the effect of a judgment confessed, from the date thereof, against the person and property of the bail."

In the absence of the above provisions of the statute, a judgment could not be stayed by putting in bail. The judgment debtor who seeks the benefit of the statute must comply, substantially, with its provisions. He can not, by procuring bail for a part of a judgment against him, obtain a stay of execution. The undertaking of the recognizance must, by the express terms of the statute, be for the payment of the whole judgment. He can not obtain a stay upon one half of the judgment by putting in bail for its payment, nor can he stay

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the whole judgment "by halves." *The Vincennes Nat'l Bank v. Cockrum*, 64 Ind. 229. If the recognizances in this case are valid, each must be considered good without reference to the other. They are in no way connected; each is distinct from, and independent of, the other, and the validity of neither depends upon the existence or validity of the other. That executed by Cockrum and others, if valid as a statutory recognizance of bail, had the effect, at the time of its approval, to stay execution on one-half of said judgment. But, as the statute does not authorize a stay of execution on a part of a judgment, these recognizances must, as statutory recognizances, be held invalid, unless some provision of law gives them an effect beyond that which their terms clearly express.

It is insisted that section 790 of the code applies to recognizances of replevin bail, and this has been too often held to be now questioned. *Hawes v. Pritchard*, 71 Ind. 166, and cases there cited.

It is insisted that this section so changes these recognizances that they secure the whole and not a part of the judgment; that though the recognizers expressly stipulated to pay a part only of the judgment, yet, by force of this section, they must be held to have undertaken to pay the whole judgment. And this is held to be the law in the case of *The Vincennes National Bank v. Cockrum*. This effect should not be given to the statute unless its language plainly and clearly requires it. The section is as follows:

"No official bond entered into by any officer, nor any bond, recognizance or written undertaking, taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance, recital, or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance or written undertaking, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance."

If this section applies to these recognizances, then, by its

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express terms, the recognizers, being sureties, can not be bound to a greater amount than that specified in the recognizance, to wit: one-half of the judgment. But as there is no law authorizing a stay of execution upon a recognizance to secure the payment of one-half a judgment, it follows that, as statutory recognizances, they are invalid.

But it is averred in the first paragraph of the complaint, that, before the execution of said recognizances, an execution had been issued on said judgment, at which time Hargrove and Trippet owned and possessed a large amount of personal property in said county, out of which said judgment might have been satisfied; that it was returned on the day the recognizances were executed, and no other execution issued until they had sold and disposed of said personal property. It is also averred that the bail, as entered, was accepted by the judgment plaintiffs. If they accepted the bail, they must be held to have known that the recognizances were void, and that their acceptance did not require or justify the return of the execution on which they were endorsed. Their acceptance of the bail was an implied direction to the sheriff to return the execution.

Did the return of the execution without levy, by the direction of the judgment creditors, it being a lien on personal property of the principal judgment debtors sufficient to satisfy the judgment, discharge the sureties? Where the creditor, with knowledge of the fact that some of the judgment debtors are principals and others sureties, has acquired a lien upon the goods of the principal debtors, by issuing execution, does the law require him to preserve, so far as he can by reasonable diligence, the lien so acquired, for the benefit of the surety? Upon this proposition, the authorities are conflicting.

In the case of *Robeson v. Roberts*, 20 Ind. 155, this court declined to decide the question. Brandt says, in speaking upon this subject: "The better opinion, and the one sustained by the weight of authority, however, is that if when the execution is issued, it becomes a valid lien on property of the prin-

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cipal without any levy being made, and such lien is lost in consequence of the return of the execution without a levy by procurement of the creditor, and the surety is thereby injured, he is discharged *pro tanto*." Brandt Suretyship, section 382.

In the case of *Ferguson v. Turner*, 7 Mo. 497, the court say: "Execution had issued, and was in the hands of the sheriff, a lien upon the personal property of the debtor. This lien they voluntarily discharge, without consideration; this they had no right to do. The security, so soon as the lien of the execution attached, was interested in the retention of that lien, and the discharge of the lien discharged the security." In the case of *Bullitt's Ex'rs v. Winstons*, 1 Munf. 269, it was held that a letter from the judgment plaintiff to the sheriff, to suspend proceedings on the execution against the principal debtor, discharged the surety. *Brown v. The Executors of Riggins*, 3 Ga. 405; *Dills v. Cecil*, 4 Bush, 579; *Miller v. Dyer*, 4 Duvall, 263.

We are inclined to the opinion that the better reason is with the above cases, and that the release of the lien of the execution upon the goods of the principal debtor, by authorizing the return of the writ, discharges the surety to the extent that he may be injured by such relinquishment of the lien. In this case, it is averred that the goods, upon which the execution operated as a lien, were sufficient to satisfy the judgment, and that by the return of the execution the goods were lost. We conclude, therefore, that the court erred in sustaining the demurrer to the first paragraph of the complaint.

We think the court did not err in sustaining the demurrer to the second paragraph of the complaint. It is clear, upon the facts stated, that the recognizances of bail were invalid under the statute, and that they did not have the effect of judgments confessed. It follows that the parties executing the recognizances did not become, as to the appellant, the principal debtors and he their surety. The demurrer was, therefore, rightly sustained to this paragraph.

The question arising on the third paragraph is somewhat different from that arising upon the first. While the recogni-

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zances executed pursuant to the agreement of the parties are shown to be void as such, they were yet in accordance with the agreement. The judgment plaintiffs are alleged to have agreed, that, in consideration that the principal judgment debtors would procure bail to be entered for Hargrove's half of the judgment, and for Trippet for one-half of it, and procure the assent of the appellant to the extension of time for the payment of the judgment, they, the judgment plaintiffs, would extend the time for the payment of the judgment for one year. It is averred that the bail was procured as agreed, and that the appellant, while ignorant of the agreement, consented to the extension of the time for its payment. We think the fair construction of the agreement, as stated in this paragraph, is, that Hargrove and Trippet were to procure the consent of the appellant to the extension of time upon the terms of the agreement. Had the appellant's assent to the proposed extension been procured upon the terms stated in the alleged agreement between the judgment plaintiffs and Hargrove and Trippet, the extension would not have released him, though his co-surety, Miller, might have been released. It is expressly averred in the complaint, that Hargrove and Trippet did not procure the consent of the appellant to the extension of the time for the payment of the judgment upon the terms of said agreement. Upon these facts it is quite clear that the transaction did not have the effect to extend the time for the payment of said judgment; that, notwithstanding the agreement and the part performance of the same by Hargrove and Trippet, the judgment plaintiffs could have enforced the judgment at any time.

Had it been averred in this paragraph, as it is in the first, that Hargrove and Trippet had, at the time of the issuing of the first execution, personal property subject to execution, and that, upon making the agreement, the judgment plaintiffs had authorized the return of the execution, and thereby released the lien upon their property, in consequence of which the same had been disposed of and placed beyond the reach of an

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execution, a very different question would be presented. But, in the absence of such averments, we think there was no error in sustaining the demurrer to the third paragraph of the answer.

As the first paragraph of the complaint was good, the judgment below should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees, with instructions to overrule the demurrer to the first paragraph of the complaint. So far as the case of *The Vincennes National Bank v. Cockrum*, 64 Ind. 229, is in conflict with the foregoing opinion, it is overruled.

NIBLACK, J., was absent.

Petition for a rehearing overruled.

 No. 8611.

BRATTON v. BRATTON.

PRACTICE.—*Summons.*—*Service.*—*Continuance.*—*Divorce.*—A failure to serve the summons under section 13 of the act concerning divorces, ten days before the first day of the term of court, is no cause for setting aside the service or quashing the writ, but merely a cause for a continuance of the case.

SAME.—*Continuance.*—*New Trial.*—The refusal of the court to grant a continuance must be assigned as a cause for a new trial, to present any question thereon in the Supreme Court.

From the Boone Circuit Court.

P. S. Kennedy and *W. T. Brush*, for appellant.

C. S. Wesner, for appellee.

NIBLACK, J.—Suit by Eliza W. Bratton against her husband, John N. Bratton, for divorce, alleging cruel and inhuman treatment and abandonment.

On the day on which the summons was made returnable, the defendant entered a special appearance, and moved to set aside the service of and quash the summons, but his motion

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was overruled. He then moved for a continuance of the cause, but that motion was also denied. For some cause, however, not explained by anything contained in the record, the cause was afterwards continued until another term.

At the hearing the court made a finding for the plaintiff, and, over a motion for a new trial, entered a decree for a divorce, allowing the plaintiff a small sum of money for alimony.

The first question made here is upon the refusal of the court to set aside the service of the summons and to quash the writ.

The record does not show upon what alleged state of facts that motion was based. If, as stated in the appellant's brief, it was because the summons was not served ten days before the first day of the term of court, as was required by section 13 of the act concerning divorces, then supposed to be in force, that was a cause for a continuance merely, provided that objection was well taken, a question we need not now decide.

The next question made here is upon the overruling of the motion for a new trial.

The refusal of the court to grant a continuance was not assigned as a cause for a new trial. Consequently, no question upon that refusal arises in this court. Besides, there is nothing to show that the appellant was injured by the denial of his motion, as the cause was afterwards continued until another term.

It is insisted that the finding of the court was not sustained by sufficient evidence.

The evidence did not make out a strong case for a divorce, and we are inclined to the opinion that the court might, with propriety, have refused to divorce the parties upon it. But there was evidence tending to sustain some of the most material allegations in the complaint, and, upon a full examination of all the evidence, we have come to the conclusion that the judgment below ought to be affirmed.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled.

Cox *et al.* v. Hunter, Adm'r.

No. 8978.

COX ET AL. v. HUNTER, ADM'R.

FRAUDULENT CONVEYANCE.—*Suit by Grantor's Administrator to Avoid Deed.*—*Sufficiency of Complaint.*—Under the provisions of sections 84, 85 and 86 of the act of June 17th, 1852, providing for the settlement of decedents' estates (sections 2333, 2334 and 2335, R. S. 1881), where the administrator of a deceased grantor sues to avoid the conveyance of his decedent and to subject to sale, for the payment of debts, the real estate conveyed, upon the ground that the deceased, in his lifetime, had transferred the same with intent to defraud his creditors, the record must show that the action was instituted within five years after the death of the decedent, and the complaint must state substantially the same facts, as the decedent's creditors would have been required to allege, if they had sued to set aside the alleged fraudulent conveyance.

SAME.—In such action, the administrator's complaint must show affirmatively, in order to constitute a cause of action, that the deceased grantor, in the alleged fraudulent conveyance, had no other property for the payment of his existing debts, not only at the time of such conveyance but also at the time of his death and the commencement of the action.

PLEADING.—*Practice.*—*Defective Complaint.*—*Failure to Demur.*—*Waiver.*—*Effect of Verdict.*—Where necessary facts are defectively alleged, and no objection has been taken thereto by motion or demurrer, it may sometimes be said that the defects have been obviated by evidence and cured by the verdict; but where the complaint entirely omits allegations of material facts, necessary to the maintenance of the action, such allegations can not be supplied by evidence, nor can their omission be cured by the verdict, nor is the objection waived by a failure to demur.

From the Warren Circuit Court.

J. McCabe and *C. M. McCabe*, for appellants.

J. M. Rabb and *J. W. Sutton*, for appellee.

HOWK, J.—This was a suit by the appellee, as the administrator of the estate of Sylvanus Cox, deceased, against the appellants, to set aside a certain deed alleged to have been fraudulently executed by said Sylvanus Cox, in his lifetime, to the appellant Robert E. Cox, and to subject the real estate therein described to sale for the payment of said decedent's debts. The cause, having been put at issue, was tried by a jury and a verdict was returned, in substance, as follows: "We,

79	590
133	263
79	590
136	147
79	590
147	402
147	584

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the jury, find for the plaintiff as against the defendant Robert E. Cox, and that the conveyance to him in question was fraudulent as against the creditors of Sylvanus Cox, deceased, and we further find, that the defendant Corey became the purchaser of part of the real estate in question, as charged in the complaint, and there will be due from him to the defendant Robert E. Cox, on account of such purchase, on the 24th day of March, 1881, the sum of \$168."

The appellants' motions for a new trial, and in arrest of judgment, having each been overruled, and their exceptions saved to each of these rulings, the court rendered judgment on the verdict for the appellee, as prayed for in his complaint.

In this court, the appellants have assigned errors as follows :

1. The complaint does not state facts sufficient to constitute a cause of action.
2. The complaint does not state facts sufficient to constitute a cause of action against them, or either of them.
3. The circuit court erred in overruling their motion in arrest of judgment.
4. The court erred in rendering judgment, collectible without relief from valuation laws.
5. The court erred in overruling their motion for a new trial.

In his complaint, the appellee alleged in substance, that, on the — day of December, 1875, the decedent, Sylvanus Cox, was the owner of certain real estate, particularly described, in Warren county, containing one hundred acres, more or less, which was reasonably worth \$3,000, and was all the property, real or personal, belonging to said decedent at that time, subject to execution ; that said decedent was, at the time, indebted to various persons in the sum of \$900, of which about \$90 was secured by a mortgage on said real estate ; and that, at said date, the said decedent, for the fraudulent purpose of cheating, hindering and delaying his creditors, except those secured by said mortgage, voluntarily conveyed said real estate to the appellant Robert E. Cox, who was the decedent's

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only child, which said conveyance of said real estate was so received by the appellant Cox, without giving any consideration therefor, except his agreement to assume and pay the said mortgage debt, and with full knowledge on his part of the fraudulent purpose of his grantor, and that the conveyance of said real estate entirely stripped the decedent of all the property, subject to execution; that afterwards, to wit, on the — day of —, 187—, said Sylvanus Cox died intestate, leaving no personal estate whatever, that had come to appellee's knowledge, and leaving said debts, existing at the time of said fraudulent conveyance, due and unpaid, and then valid and subsisting demands against said decedent's estate; and that, on the — day of February, 1880, the appellee was duly appointed the administrator of said decedent's estate by the proper court, and, as such, had duly qualified and entered upon the discharge of his duties.

And the appellee further alleged, that, on the — day of —, 1879, the appellant Robert E. Cox conveyed by deed a part of said real estate to the appellant Ezra J. Corey, who was still indebted to his co-appellant Cox, in the sum of \$225, on account of the purchase-money of said real estate; wherefore, etc.

It will be observed that the first three errors assigned by the appellants call in question the sufficiency of the facts stated in appellee's complaint to constitute a cause of action, all of them, however, after the trial and verdict, and the first two of them after the rendition of judgment, on appeal and for the first time in this court. It is manifest, from the facts alleged in the complaint, that the appellee commenced his suit under the provisions of the *third* clause of section 84 of the act of June 17th, 1852, providing for the settlement of decedents' estates. In said section 84, it is provided that "The real estate liable to be sold for the payment of debts, when the personal estate shall be insufficient therefor, shall include—* * * *
Third. All lands, and any interest therein, which the deceased, in his lifetime, may have transferred, with intent to defraud his creditors." 2 R. S. 1876, p. 526; section 2333, R. S. 1881.

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In section 85 of the same act, it is further provided: "But the lands thus fraudulently conveyed shall not be taken from any one who may have purchased them for a valuable consideration, and without knowledge of the fraud, but such lands shall be liable to be sold only in cases in which they would have been liable to attachment and execution by a creditor of the deceased in his lifetime; and no proceeding by any executor or administrator, to sell any lands so fraudulently conveyed, shall be maintained, unless the same shall be instituted within five years after the death of the testator or intestate." Section 2334, R. S. 1881.

The first objection urged by the appellants' counsel to the sufficiency of appellee's complaint in this case is, that "it does not allege that the said Sylvanus Cox died within five years next before the filing of said complaint." It will be seen from the closing sentence of section 85, above quoted, that no such proceeding as the one now before us "shall be maintained, unless the same shall be instituted within five years after the death of the testator or intestate." The proceeding could not be maintained, unless instituted within the time limited, and therefore it was incumbent on the appellee to show by the allegations of his complaint, that the death of his intestate had occurred within five years before the institution of his suit. If his complaint contained no such showing, it would have been bad, we think, on a demurrer thereto for the want of sufficient facts. The record shows that this suit or proceeding was instituted by the appellee on the first day of March, 1880. It was alleged in the complaint that "on the — day of December, 1875, the decedent, Sylvanus Cox, was the owner in fee simple of the following described land," etc., "and that, at said date, the said decedent for the fraudulent purpose," etc., "voluntarily conveyed said premises to the defendant Robert E. Cox," etc., "and that afterwards, to wit, on the — day of —, 187—, said Sylvanus Cox died intestate," etc. The blanks as to dates, in these allegations, are a just sub-

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ject of criticism ; but an objection to a pleading, on the ground of blank dates therein, can not ordinarily be reached by a demurrer thereto for the want of sufficient facts (though it may where the suit must be commenced within a specified time), but only by a motion to make more specific. *Hyatt v. Mattingly*, 68 Ind. 271 ; and *Shappendocia v. Spencer*, 73 Ind. 128.

It seems to us, however, that the complaint shows with sufficient certainty, at least after verdict, that this proceeding was instituted within five years after the death of the appellee's intestate. Thus, it is directly alleged that Sylvanus Cox, in December, 1875, was the owner of the real estate in controversy, "and that, at said date, the said decedent * * * voluntarily conveyed said premises," etc. From these allegations, it will be seen, the complaint fairly showed that "the said decedent" did not die until after "the — day of December, 1875," because it alleged that, "at said date," he conveyed said premises, "and that afterwards, to wit, on the — day of —, 187—, said Sylvanus Cox died intestate." It appears, therefore, from the complaint, that appellee's intestate did not die before December, 1875, and, if he died then, five years did not elapse until December, 1880. The complaint states that the appellee was appointed administrator of his decedent's estate in February, 1880, and the record shows that this suit or proceeding was instituted on the first day of March, 1880, and, of course, within five years after the death of the intestate.

It is earnestly insisted by the appellants' counsel that the facts stated in the complaint are not sufficient to show that the real estate therein described was liable to be sold for the payment of the debts of the appellee's intestate, under the provisions of sections 84 and 85, above quoted, of the act for the settlement of decedents' estates. In section 86 of the same act it is provided as follows: "If the executor or administrator shall be authorized to sell any lands thus fraudulently conveyed, he may, before sale, obtain possession by an action for the possession thereof, or may file a petition to avoid the fraudulent conveyance." 2 R. S. 1876, p. 527 ; section 2335, R. S. 1881.

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It would seem from his prayer for relief, that the appellee filed his complaint, in this case, to avoid the alleged fraudulent conveyance by his intestate to the appellant Robert E. Cox; and the appellee's counsel, in their brief of this cause, expressly declare that the complaint was filed for no other purpose than to avoid such fraudulent conveyance. The appellee sued in this action, not, perhaps, as a creditor, but as the representative of the creditors of his intestate, and for them and in their behalf. It was necessary, therefore, that he should state such facts in his complaint, as the creditors of his intestate would have been required to allege, if they had sued to set aside the alleged fraudulent conveyance, in order to constitute a good cause of action. As between the parties thereto, the conveyance was valid and binding, and it could only be set aside or avoided by, or on behalf of, existing creditors of the grantor at the time of its execution. In *Brucker v. Kelsey*, 72 Ind. 51, in delivering the opinion of the court, WOODS, J., said: "The same reason on which the rule is founded, which requires it to be averred that the grantor in an alleged fraudulent conveyance had not other property at the time of the conveyance, out of which the debt could be made, requires a corresponding averment in reference to the time of the commencement of the action. * * * * The proper rule of pleading is, that the complaint show affirmatively a complete right of resort to the land for satisfaction of the debt, and that can not be, unless when made the conveyance was fraudulent as against creditors, and unless the right of action, which then arose, is shown to continue to exist at the time when suit is begun. *Baugh v. Boles*, 35 Ind. 524." *Sherman v. Hogland*, 73 Ind. 472.

It will be seen from the complaint, a full summary of which we have given, that it shows with sufficient certainty, that, at the time the appellee's intestate executed the alleged fraudulent conveyance to the appellant Robert E. Cox, he had left no other property, real or personal, for the payment of his alleged existing debts. But, while this is so, it is manifest

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also, that the complaint utterly fails to show that at the time of his death the appellee's intestate did not have other property, amply sufficient for the payment of all his debts; or that, at the commencement of this suit or proceeding, there was not sufficient other property, belonging to the estate of said intestate, to pay off and satisfy the claims of all his creditors. It is very clear, therefore, that the appellee's complaint was bad, if there had been a demurrer thereto for the want of sufficient facts.

It is claimed, however, by appellee's counsel, that, as the complaint was not demurred to, it must be held to be sufficient after verdict, for the reason that its omissions were probably supplied by the evidence and cured by the verdict. If the appellee had defectively alleged the necessary facts, such defective allegations might, perhaps, have been cured by the verdict. But where, as in this case, the complaint entirely omits allegations of fact, necessary and material to the maintenance of the suit, such allegations can not be supplied by evidence, nor can their omission be cured by the verdict.

Having reached the conclusion that the appellee's complaint was bad, even after verdict, for the want of sufficient facts therein, it is unnecessary for us to consider or decide any question arising under either of the other alleged errors.

The judgment is reversed, at the appellee's costs, and the cause is remanded with leave to the appellee to amend his complaint, and for further proceedings in accordance with this opinion.

No. 8541.

O'CONNOR v. COATS ET AL.

FRAUDULENT CONVEYANCE.—*Preference of Creditors.*—A debtor may prefer one creditor over another, and a sale of property for that purpose will not be set aside.

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SAME.—Partnership and Individual.—Pleading.—Under a complaint which charges the transfer of property in fraud of creditors generally, but does not allege a partnership, nor that the demand of the plaintiff arose out of a partnership transaction, no question of priority of right between partnership and individual creditors can arise.

From the Owen Circuit Court.

I. H. Fowler, W. E. Dittmore, I. E. Johnson and C. E. Johnson, for appellant.

W. M. Franklin and S. O. Pickens, for appellees.

WOODS, J.—Error is assigned solely upon the overruling of the motion for a new trial, which was asked on the ground that the verdict was contrary to the law and the evidence. The appellant brought the action, alleging in two paragraphs of his complaint, that he had obtained a judgment against the defendants Coats and Froth, on which execution had been issued and returned *nulla bona*; and that, with intent to defraud the plaintiff and other creditors, Froth had conveyed to the defendants Robinson and Wisely certain real estate; and in two other paragraphs alleging that he had obtained a judgment against said defendants Coats and Froth, on which execution had been issued and returned *nulla bona*; and that said defendants, with intent to defraud the plaintiffs and their other creditors, had pretended to sell and transfer to said Robinson and Wisely, who were participants in the fraudulent design, a certain stock of goods in a country store, the property of said Coats and Froth.

Counsel for the appellant claim that the evidence shows that the sale of the property described was made for the purpose of applying the proceeds to the payment of the individual creditors of Froth, and that, as a creditor of Coats and Froth, the appellant had a right to be first paid out of the partnership property.

It is a sufficient answer to this, that the complaint evidently was not drawn for the purpose of asserting any such right, and does not state facts sufficient to establish it. It is not alleged that Coats and Froth were partners, and if it were

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possible to infer a partnership from what is averred, it is not alleged that the claim on which the appellant obtained a judgment against them arose out of a partnership transaction. Besides, the evidence does not show a sale of goods by Coats and Froth to the other defendants, as charged. On the contrary, it appears that Coats and Froth had voluntarily dissolved their partnership, Froth taking a part of the partnership goods, which, together with other goods bought upon his own credit, he afterwards sold to Robinson and Wisely, and applied the proceeds to the payment of his individual liabilities, as by law he had the right to do.

Judgment affirmed, with costs.

No. 7564.

STERNE v. THE VINCENNES NATIONAL BANK ET AL.

From the Gibson Circuit Court.

J. E. McCullough, L. C. Embree, W. H. Trippet, and M. W. Fields, for appellant.

F. W. Viehe, R. G. Evans and T. R. Paxton, for appellees.

MORRIS, C.—The appellant's complaint contains eight paragraphs. By the suit he seeks relief from two judgments, rendered by the Gibson Circuit Court, on the 2d day of February, 1875, in favor of The Vincennes National Bank, against Jacob W. Hargrove and Caleb Trippet, as principals, and the appellant and one Miller, as sureties; one for \$4,227.50, the other for \$5,628.75.

The first, second, fifth and seventh paragraphs relate to the smaller judgment, and the third, fourth, sixth and eighth, to the larger one.

The appellees demurred severally to each paragraph of the complaint. The demurrers were sustained, and final judgment rendered for the appellees.

The appellant assigns the rulings of the court upon the demurrers as errors.

The Vincennes National Bank filed cross complaints which were dismissed upon the motions of the defendants to the same. They are made part of the record by a bill of exceptions, and the bank assigns as error the dismissal of its cross complaints.

The four paragraphs of the complaint which relate to the judgment for \$4,227.50 are in substance the same as the four which refer to the larger judgment.

The first, second and fifth are the same as the first, second and third paragraphs in the case of *Sterne v. McKinney et al.*, ante, p. 578. For the reasons stated in that opinion, the court erred in sustaining the demurrer to the first paragraph of the complaint. The demurrers to the second and fifth were properly sustained. The seventh paragraph of the complaint is, substantially, the same as the fourth paragraph in the case of *Sterne v. The Bank of Vincennes et al.*, ante, p. 549, and for the reasons given in that case, there was no error, we think, in sustaining the demurrer to it.

Dorman v. The State.

The demurrer to the third paragraph of the complaint, which is the same as the first, except that it relates to a different judgment, should have been overruled. The demurrers to the fourth, sixth and eighth were properly sustained.

We think, for the reasons stated in the case of *Sterne v. The First National Bank of Vincennes et al.*, ante, p. 560, there was no error in dismissing the cross complaint filed by the bank.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees.

NIBLACK, J., was absent.

Petition for a rehearing overruled.

No. 7417.

THE STATE, EX REL. WALTON, v. PRICE ET AL.

From the Tippecanoe Circuit Court.

D. Walton, for appellant.

I. Parsons, G. O. Behm and A. O. Behm, for appellees.

FRANKLIN, C.—This is a suit by appellant on a constable's bond against appellee Price and his sureties.

The appellees answered in two paragraphs. The first was a general denial, the second was a special answer.

The appellant demurred generally to the answer. The demurrer was overruled and an exception reserved.

The appellant declined to reply over, and elected to stand upon his demurrer. The court found for appellees, and gave judgment for costs accordingly.

The only error assigned in this court is the overruling of the demurrer to the answer.

This record presents the appellant in the attitude of appealing from the decision of the court below in overruling a demurrer to the general denial.

There was a rehearing granted in this case, and a petition filed by appellant for a writ of *certiorari* to perfect the record. The petition was overruled, and the cause again submitted for decision.

There is no error presented in the record.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and it is in all things affirmed, at appellant's costs.

No. 9989.

DORMAN v. THE STATE.

From the Hendricks Circuit Court.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellant.

D. P. Baldwin, Attorney General, *N. M. Taylor*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

PER CURIAM.—The appellant was convicted and adjudged to pay a fine for an unlawful sale of intoxicating liquors, and the question is whether the evidence supports the charge. No useful purpose would be subserved by giving the evidence or a synopsis of it. Our conclusion is that the evidence does not sustain the charge.

Judgment reversed.

The State, *ex rel.* Manchester Township, v. Haynes.

No. 10,088.

EX PARTE WALTON.

From the Decatur Circuit Court.

E. P. Ferris, W. A. Moore, W. W. Spencer and J. S. Ferris, for appellant.
D. P. Baldwin, Attorney General, *M. D. Tuckell*, Prosecuting Attorney,
and *J. D. Miller*, for the State.

HOWK, J.—At the February term, 1882, of the Decatur Circuit Court, an indictment was duly returned against Ellen V. Walton, charging her with murder in the first degree, as an accessory before the fact. Being in the custody of the sheriff of Decatur county, under said indictment, she presented her petition to the court below for a writ of *habeas corpus*, in order that she might be admitted to bail. The grounds of her application were, that the proof was not evident, nor the presumption strong, of her guilt of the offence wherewith she was charged. The court granted the writ, and upon a full hearing of all the evidence, as well for the State as for the petitioner, made an order refusing to admit her to bail, as prayed for in her petition. To this ruling she excepted at the time, and has appealed therefrom to this court.

All the evidence is in the record, and under the established practice of this court, in such cases, which we can not see any good reason for departing from in this case, we must weigh this evidence and determine the question presented by the petition, without special regard to the finding and decision of the circuit court. *Ex Parte Heffren*, 27 Ind. 87; *Ex Parte Moore*, 30 Ind. 197; *Ex Parte Sutherland*, 56 Ind. 595.

We have carefully examined and considered the evidence, having been much aided therein by the able and elaborate arguments, oral and written, of the counsel for the State and for the petitioner. Upon due consideration of the evidence, and of the arguments of counsel, we are of the opinion that the proof is not evident nor the presumption strong of the guilt of the petitioner of the offence charged against her. Our conclusion is, therefore, that the court erred in its refusal to admit the petitioner to bail.

The order and judgment are reversed, and the case is remanded, with instructions to admit the petitioner to bail.

ELLIOTT, C. J., and WOODS, J., dissent, and say that, in their opinion, the evidence shows a strong presumption of the guilt of the petitioner, and that, for this reason, she ought not to be admitted to bail.

No. 8743.

THE STATE, EX REL. MANCHESTER TOWNSHIP, v. HAYNES.

From the Dearborn Circuit Court.

H. D. McMullen, D. T. Downey and M. A. Spooner, for appellant.
J. D. Haynes, J. K. Thompson and J. Schwartz, for appellee.

NEWCOMB, C.—The complaint, answers, replies, demurrers and rulings of the court below are in all respects the same as in the case of *The State, ex rel. Manchester School Township, v. Haynes*, ante, p. 294, except that the defaultation charged is but \$127.03, and is alleged to be due to the civil township.

For the reasons given in that case the judgment in this should be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and the same is, in all things reversed, at the costs of the appellee, and that said cause be remanded to the Dearborn Circuit Court for further proceedings in accordance with said opinion.

70a	600
137	94
70a	600
147	29

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2. *Same.—Street.—Permissive Possession.—Prescription.*—Mere permissive possession of a part of a street for the statutory period of limitation will not confer title. There can be no permanent rightful possession of a public street. *Id.*

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2. *Supreme Court.—Evidence.*—A bill of exceptions containing evidence must be definitely settled in the trial court. The Supreme Court can not undertake to determine, from conflicting statements, which is the correct version of the testimony of witnesses. *Stout v. Woods, 108*
3. *Same.—Part of Evidence.*—Where a bill of exceptions does not contain the usual statement, "This was all the evidence given in the cause," but contains all relating to the point to be considered, the Supreme Court will examine the ruling admitting it. *Ib.*
4. *Time.*—Where sixty days from April 20th were allowed for the filing of a bill of exceptions, the filing of such bill on June 20th, following, was too late. *Hall's, etc., Co. v. Rigby, 150*
5. *Evidence.*—"Offered" and "Given" not Equivalent.—In a bill of exceptions, the words, "This was all the evidence offered in the case," are not equivalent to the words, "This was all the evidence given in the cause." *Baltimore, etc., R. R. Co. v. Barnum, 261*
6. *Same.*—"Here Insert."—Unauthorized Transcript of Exhibits Annexed.—Unless a bill of exceptions contains the direction "here insert," the clerk is not authorized by the court to copy into the transcript exhibits annexed by him to the bill of exceptions after the signature of the judge. *Ib.*
7. *Record.*—A paper purporting to be a bill of exceptions, which is not signed by the judge, can not be regarded as a bill of exceptions. *Keiser v. Lines, 445*
8. *Filing.*—When a bill of exceptions is signed in vacation it will not be deemed a part of the record, unless it appear otherwise than by the bill itself, that time was given to prepare it. *Indianapolis v. Kollman, 504*

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Mortgage.—Pleading.—Evidence.—Witness.—Cross Examination.—A complaint alleged an agreement by the defendant, in consideration of the assignment to him by the plaintiff of a certain mortgage, that he would pay to the plaintiff certain sums of money, and the further sum of \$10 on Friday of each week, as dues on the principal of said mortgage, and \$20 on the first Friday of each month as interest on said mortgage, in accordance with sections 3, 4 and 7 of the constitution and by-laws of the plaintiff (a building and loan association), until all the shares of stock should be paid and the plaintiff dissolved; and further, that he would pay the plaintiff all further sums or dues which might be

assessed by its board of directors against him; that the sum of \$200 was legally assessed, and that the mortgage was duly assigned, and that the shares were not fully redeemed. There was a proper breach assigned, and bill of particulars.

Held, that the complaint was good on demurrer.

Held, also, that the constitution and by-laws of the plaintiff, also an order of its board of directors authorizing the assignment of the mortgage by its president and secretary, were admissible in evidence.

Held, also, that a witness, the secretary of the plaintiff, might state the amount due from the defendant without accompanying the statement with the data from which it was made and a statement of the plaintiff's assets and liabilities; and if the defendant desired the data, or the sources of knowledge of the witness, he could obtain them on cross examination. *Eigenman v. Rockport, etc., Association*, 41

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1. *Maintenance*.—The distinction between maintenance and champerty is, where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but where he stipulates to receive a part of the thing in suit, he is guilty of champerty. *Stotsenburg v. Marks*, 193
2. *Same.—Contract*.—A contract, whereby "for value received" L. conveyed and transferred to D. all his estate in Ireland, to wit, the estate of his deceased wife, in trust that D. pay just and legal expenses incurred or to be incurred in the recovery of the estate or any part of it, pay to L. the half of the residue and appropriate to his own use the other half, is not on its face void for champerty or maintenance. *Id.*

CHATTEL MORTGAGE.

See REPLEVIN.

1. *When Void Upon its Face.—Fraudulent Intent.—Question of Fact*.—A mortgage of chattels made with intent to hinder, delay or defraud creditors, is void as to such creditors; but as the question of fraudulent intent is made by statute in this State (section 4924, R. S. 1881), in all cases a question of fact, the cases will be rare indeed in which it can be said, as matter of law, that a chattel mortgage is void upon its face. *Lockwood v. Harding*, 129
2. *Same.—Action to Set Aside Mortgage.—Sufficiency of Complaint*.—In an action by the creditors of the mortgagor of chattels to set aside the mortgage as fraudulent against them, if the complaint contains no allega-

tions of facts impeaching the good faith of the parties to the mortgage, or the validity of the debts thereby secured, or the good faith and integrity of the parties in their dealings with the mortgaged property, such complaint is bad on a demurrer thereto, for the want of sufficient facts. *Ib.*

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2. *Negligence.—Leaving Dangerous Excavation in Street.—Damages.*—Where a horse takes fright and runs away and is injured because of the negligence of a municipal corporation in leaving a dangerous excavation in a street unprotected, an action may be maintained against the corporation, if the driver of the horse exercised due care and skill in driving and managing it. *City of Crawfordsville v. Smith, 308*
3. *Same.—Streets.*—A municipal corporation is charged with the duty of maintaining its streets and highways in a reasonably safe condition for travel. *Ib.*
4. *Streets.—Lot Owner.—Prescription.—Injunction.—Complaint.—Answer.*—In an action for injunction, by a lot owner against a city, where the complaint alleged that plaintiff's lot had been improved with reference to the recognized line of the street as laid out and used for more than twenty years, and while the municipal officers stood by and saw such improvements made without objection, and that the city was about to sever from the side of the lot a strip of ground claimed as a part of the street, without an assessment and tender of damages, an answer that an ordinance to improve the street was duly passed, notice given, proposals received and a contract made for grading and gravelling the street, and that, upon a survey by the proper officer, the strip of ground appeared to be a part of the street properly dedicated to the public use and platted in the original plat, was sufficient on demurrer. *Sims v. City of Frankfort, 446*
5. *Highway Outside Boundaries.—Drainage.—Damages.—Consequential Injuries.*—A municipal corporation has authority to use a public way lying outside of its boundaries, for the purpose of drainage, without paying or tendering damages to adjacent property owners, and for consequential injuries resulting from the proper and reasonable exercise of such authority there can be no recovery. *Cummins v. City of Seymour, 491*
6. *Same.—Street Improvements, Authority to Make.*—A municipal corporation is not bound to let all public work to contractors; but sewers, bridges and the like may be built by the officers of the city, if the governing corporate officers deem it expedient. *Ib.*
7. *Same.—Care, Diligence and Skill.*—Where municipal improvements are made with ordinary care, diligence and skill, the corporation is not responsible for injuries resulting to adjacent property. *Ib.*
8. *Same.—Officers.—Presumption.*—Until the contrary appears, the officers of a public corporation are presumed to have done their duty. *Ib.*

9. *Same.—Defect in Plan.*—A municipal corporation is liable for injury resulting from a negligent error in the plan of a drain or sewer. *Ib.*
10. *Streets and Sidewalks.—Damages.—Liability of Author of Nuisance to Corporation.*—If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrong-doer as between itself and the author of the nuisance.
Catterlin v. City of Frankfort, 547
11. *Same.—Contributory Negligence.—Complaint.—Notice.*—In such case, there being no allegation that the defendant had notice of such action against the city, the complaint of the corporation against the author of the nuisance must allege that the injured person was free from negligence contributing to his injury. *Ib.*
12. *Same.—Estoppel.—Judgment.*—In such case, the defendant is not estopped by the judgment against the corporation from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident happened. *Ib.*

• CITIES AND TOWNS.

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1. *Modification.—Acceptance.*—In order to constitute a contract, it is essential that the proposition of one party should be assented to by the other, exactly as made. A modified acceptance can not make a valid contract until the one who makes the proposition assents to the modification asked by the other. *Curtmel v. Newton, 1*
2. *Assignment of Tax Certificate.—Pleading.—Mistake of Law.*—The complaint averred a purchase by the defendant of land at a tax sale and the receipt by him of a proper certificate of purchase, which he sold

and delivered to W., and agreed to transfer to him by valid assignment; that an assignment was written but never acknowledged; that W. received a tax deed upon it, and then conveyed to the plaintiff, who finding the tax sale to be a nullity, desires to apply to the county board to refund the purchase-money, but is prevented by the defective assignment, and that the defendant refuses to acknowledge the assignment.

Held, that the complaint is bad on demurrer, the mistake being one of law as to the legal effect of a written instrument. *Williamson v. Hülner*, 233

3. *Same*.—Where a party gets all he knowingly contracts for, no action lies, although that which he gets turns out to be of much less value than he supposed it to possess. *Ib.*

4. *Rescission*.—*Fraud*.—*Restoration*.—A party who desires to rescind a contract on the ground of fraud must restore, or offer to restore, what he has received on the contract, so as to place the other party, as near as may be, *in statu quo*. *Vance v. Schroyer*, 330

5. *Same*.—*Heirs*.—*Fraudulent Conveyance of Ancestor*.—*Consideration*.—*Offer to Restore Notes*.—A complaint of heirs to set aside a conveyance, fraudulently made by their ancestor, which shows that the consideration was evidenced by the notes of the grantee, must show an offer by some one to restore the notes. In such case, the heirs stand in no better position than their ancestor would occupy if alive and prosecuting the action. *Ib.*

6. *Query*.—*Attempted Fraud*.—*Misrepresentation of Matter of Law*.—If a wife, advised by her husband that a conveyance of her real estate is necessary to prevent sale for his debts, join with him in such conveyance, does such false representation of matter of law furnish a ground for setting it aside, or extenuate her attempted fraud? *Ib.*

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See DECEDENTS' ESTATES, 14; DEED; FRAUDULENT CONVEYANCE; MARRIED WOMAN, 2, 3; PARTITION, 2, 3; SHERIFF'S SALE, 1; TRESPASS; VENDOR AND PURCHASER; WILL, 6.

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2. *Same*.—*Foreign Corporations*.—*Taxation of Stock*.—*City*.—*Railroad*.—A city has the right to tax its citizens for stock owned by them in a foreign railroad company, although a tax has been paid thereon in the State where the corporation is located. *Ib.*

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14. *Same.—Indictment.—Averments.—Time.*—In such indictment, an averment that the animals were taken up on a day between the first day of November and the first day of April, or that they were found in the inclosure of the taker-up, is material to show that they were the subject of illegal conversion. *Ib.*
15. *Same.—Statute Construed.*—In such case, time is essential and must be correctly laid and proved. The statute, 2 R. S. 1876, p. 475, section 50, does not cover cases of an illegal taking up. *Ib.*
16. *Same.—“Convert.”—Pleading.*—In such case, the word “convert” alleges a fact, the particulars of which need not be stated. *Ib.*
17. *Same.—Certainty.*—It is the duty of the State to so frame an indictment as to apprise the defendant, with a reasonable degree of certainty, of the character of the charge preferred against him. *Ib.*
18. *Same.—Transcript of Record.—“A True Bill.”*—It is immaterial whether the words “A true bill,” endorsed upon the indictment, appear in the record as written across it, or be copied into the transcript immediately after the indictment. *Ib.*
19. *Forgery.—Indictment.*—The general rule, that an indictment for forgery must set out the forged instrument according to its tenor, does not apply when the instrument, while in the defendant's possession, has been destroyed or so mutilated as to make this impossible; in such cases only the substance of the instrument need be stated; and this seems to be so though parol evidence, sufficient to supply the missing parts of the instrument, be at hand. *Munson v. State, 541*
20. *Same.—Evidence.*—That an instrument so mutilated while in the possession of the defendant has subsequently been rendered still more so, without design, by reason of the paper becoming brittle by burning when in his possession, is no objection to its admissibility in evidence on behalf of the State. *Ib.*
21. *Habeas Corpus.—Supreme Court.—Evidence.—Bail.*—The Supreme Court, on appeal from a decision upon an application by a person charged with the crime of murder to be admitted to bail, will weigh the evidence and determine therefrom whether the proof of guilt is evident, or the presumption strong, and recommit or let to bail. *Ex Parte Walton, 600*

CROSS EXAMINATION.

See BUILDING ASSOCIATION.

DAMAGES.

See CITY, 2, 5, 10; NEGLIGENCE, 5; STATUTE OF FRAUDS, 6; STREET, 3; SUPREME COURT, 4.

DECEDENTS' ESTATES.

See FRAUDULENT CONVEYANCE, 2 to 4; SET-OFF; WILL, 4, 5.

1. *Final Settlement.—Res Adjudicata.*—After an estate has been adjudged finally settled, and the administrator therefore discharged, letters of administration *de bonis non* can not issue upon the same estate, while such final settlement remains unrevoked and in force, the matter being *res adjudicata*. *Pate v. Moore, 20*
2. *Same.—Appeal Bond.—Supreme Court.*—Section 2454, R. S. 1881, requiring an appeal bond, does not apply where an executor of another estate, as such, is the appellant, section 646 making a bond by him unnecessary. *Ib.*
3. *Fraudulent Surrender of Choses in Action.—Administrator's Right to Sue.—Complaint.*—An administrator, in his fiduciary capacity, as trustee for the creditors, may maintain an action on notes and mortgages surrendered by his intestate without consideration, to defraud creditors; but

his complaint must show that his intestate, at the time of the alleged fraudulent transfer, had no other property subject to execution, sufficient to pay his debts. *Johnson v. Jones, 141*

4. *Same.—Pleading.—Disposition of Assets by Administratrix.*—In such action, by an administrator *de bonis non*, a complaint alleging that the administratrix, who was the widow, resigned without having administered upon any part of the estate; that the personal estate, except the note sued on, did not exceed five hundred dollars; that the debts amounted to \$6,500, and that the decedent died seized of no other property, either real or personal, sufficiently shows that the administratrix had made no disposition of any portion of the assets that could have been applied to the payment of debts. *Ib.*
5. *Same.—Creditor.—Judgment and Execution.*—The rule requiring the creditor to proceed with his judgment and execution does not apply where the debtor has deceased. *Ib.*
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9. *Same.—Sale of Lands.*—In a petition to sell lands, an averment that the petitioner is administrator of the deceased is a sufficient statement of his representative capacity. Profert of his letters or an averment of his appointment and qualification is needless. *Bennett v. Gaddis, 347*
10. *Same.—Will.*—Where the deceased devised his real estate, charging it with the payment of his debts, his personal representative may, if the personal estate be insufficient, obtain an order to sell the lands, the devise being no obstacle whatever. *Ib.*
11. *Same.—Petition.*—The petition in such a case is not bad as against the devisee for a failure to aver that the will has been admitted to probate, inasmuch as, without the will, he would have no interest in the land. *Ib.*
12. *Same.—Evidence.—Commissioner's Deed.*—Possession of the testator, with a deed to him purporting to be from a commissioner appointed by a competent court, without the record on which the deed is based, is, as against the devisee, sufficient evidence of the testator's title. *Ib.*
13. *Same.—Judgment.—Evidence.*—A judgment in a suit between the devisee and a stranger, whereby the title was adjudged to be in the former, is not, on the hearing of such a petition, binding upon the administrator, as evidence. *Ib.*
14. *Same.—Will.—Conveyance.*—A will is not revoked by an invalid conveyance subsequently made by the testator. *Ib.*
15. *Lease.—Trespass.—Personal Property.*—A leasehold estate is personal property, the title to which on the death of the holder passes to his administrator, and not to the widow and heirs, and for a trespass committed thereon, either before or after his death, the administrator alone could sue, and a complaint to recover for the trespass, in which the widow and heirs of the decedent join with the administrator, is insufficient on demurrer for want of facts. *Schee v. Wiseman, 389*

DECLARATION.

See EVIDENCE, 5; WITNESS, 1.

DECREE.

See ALIMONY; VENDOR'S LIEN.

14. *Same.*—*Indictment.*—*Averments.*—*Time.*—In such indictment, an averment that the animals were taken up on a day between the first day of November and the first day of April, or that they were found in the inclosure of the taker-up, is material to show that they were the subject of illegal conversion. *Ib.*
15. *Same.*—*Statute Construed.*—In such case, time is essential and must be correctly laid and proved. The statute, 2 R. S. 1876, p. 475, section 50, does not cover cases of an illegal taking up. *Ib.*
16. *Same.*—“*Convert.*”—*Pleading.*—In such case, the word “convert” alleges a fact, the particulars of which need not be stated. *Ib.*
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DECREE.

See ALIMONY; VENDOR'S LIEN.

DEED.

See DECEDENTS' ESTATES, 12, 14; FRAUDULENT CONVEYANCE; MARRIED WOMAN, 2, 3; MISTAKE; PARTITION, 2, 3; PLEADING, 9; SHERIFF'S SALE, 1; STATUTE OF FRAUDS, 3; TRESPASS; VENDOR AND PURCHASER; WILL, 6.

1. *Conveyance.—Condition Subsequent.—Breach.*—A condition in a conveyance of land to a religious society, that it shall be "held so long as needed for meeting purposes, then to revert," is not broken by the removal of the meeting house onto adjacent ground, if the land so conveyed is still needed and intended to be used for any purpose connected with the meetings of the society. *Carter v. Branson, 14*
2. *Acknowledgment.*—A certificate of acknowledgment to a deed, made by the officer merely on the assurance of another that the party executed it, is a nullity. *Mays v. Hedges, 288*
3. *Condition Subsequent.—Forfeiture.—Demand.*—To work a forfeiture of an estate by reason of a condition subsequent, it must appear that there was a demand of performance of the condition and a failure to perform. *Schuff v. Ransom, 458*
4. *Same.—Non Compos Mentis.—Instruction.*—An instruction to the jury, "that if, at the time of executing the deed in question, the grantor had mind to know and comprehend that he was making a deed and thereby conveying the land described in it to his son, and had an object in so doing which he comprehended, then he was of sound mind," is not a correct definition of mental soundness. *Id.*
5. *Same.—Action to Set Aside.—Disaffirmance.—Heirs.—Complaint.*—A deed executed by a grantor of unsound mind, he not having been so adjudged at the time of making the deed, is not void but voidable only, and he has the right to avoid or ratify it on becoming sane, and his heirs have the same right; and an action by heirs to set aside such deed can not be maintained unless some act disaffirming the deed has been done before commencing the suit; and, if the complaint fail to show this, it is bad on demurrer. *Id.*
6. *Taxes.—Covenant.—Accord and Satisfaction.*—A stipulation in a deed of real estate by the grantor to pay certain taxes thereon is a personal contract with the grantee, and not a covenant running with the land; and an accord and satisfaction thereof to the grantee while he holds title discharges the contract, so that his vendee can not recover for its breach. *Graber v. Duncan, 565*

DEFALCATION.

See TOWNSHIP TRUSTEE, 5 to 7.

DEFAULT.

See PRACTICE, 10, 11.

Setting Aside.—Excusable Neglect.—Discretion of Trial Court.—Practice.—The trial court did not abuse its discretion in setting aside a defendant's default upon his uncontradicted showing, that he had a meritorious defence; that he had been informed that the cause could not be tried at that term because the judge had been counsel for some of the parties; and that when the default was taken he had left the court room in search of his co-defendant, who had conveyed to him by warranty deed the land in controversy, and had employed counsel and promised to defend his title. *Cruce v. Cunningham, 402*

DEFECTS CURED.

See PRACTICE, 9, 20.

DEMAND.

See DEED, 3.

DEMURRER.

See JUDGMENT, 9; NEGLIGENCE, 3; PLEADING, 5 to 8, 10, 11; PRACTICE, 12, 14, 15; SUPREME COURT, 1, 6, 7, 11.

DEMURRER TO EVIDENCE.

See CRIMINAL LAW, 7; MALICIOUS PROSECUTION.

DEPOSITION.

See PRINCIPAL AND SURETY, 7.

DESCENT.

See WILL, 4.

DESCRIPTION.

See MISTAKE; MORTGAGE, 12 to 14, 16; SHERIFF'S SALE, 1; STATUTE OF FRAUDS, 5; WILL, 3.

SCRIPTIO PERSONÆ.

See PROMISSORY NOTE, 10.

DEVISE.

See WILL.

DILIGENCE.

See CITY, 7; NEW TRIAL, 1; PROMISSORY NOTE, 6 to 8.

DISAFFIRMANCE.

See DEED, 5.

DISCRETION.

See DEFAULT; DIVORCE, 12; WITNESS, 2.

DISMISSAL.

See DIVORCE, 7; SUPREME COURT, 3, 5, 8.

DIVORCE.

See PRACTICE, 18.

1. *Wife's Attorneys.—Agreement Concerning Allowance for.*—If, during the progress of an action for divorce, an attorney is employed to assist the attorneys already engaged on behalf of the wife, upon an express agreement with the wife and such attorneys that he shall look to the client for his compensation, out of the alimony allowed her if she succeeded, and that the attorneys first employed shall have the allowance for attorney's fees to be made by the court in the case, the agreement as between the attorneys is binding. *McCabe v. Britton, 224*
2. *Same.—Contract of Married Woman.*—The promise of a married woman defending an action for divorce, to pay an attorney's fee, is not binding; nor is her agreement before divorce, that the attorney may have a lien on her judgment for alimony. *Ib.*
3. *Same.—Alimony.—Lien of Attorney.—Statute Construed.*—The effect of the 17th section of the act regulating the granting of divorces is, that no liens for attorney's fees can be taken on a judgment for alimony, over and above the amount of the allowance, if one is made by the court, for the wife's reasonable expenses in the case. *Ib.*
4. *Same.—Allowance Includes Attorney's Fees.*—The allowance made by the court for the wife's reasonable expenses, in an action for divorce, includes her attorneys' fees and is conclusive upon the parties, including the attorneys interested, as to what is a reasonable allowance. *Ib.*
5. *Same.—Contract.—Attorney's Fees.—Alimony.*—If, during the progress of the trial of a divorce suit, the attorneys for the wife agree among

themselves and with her, that two of the attorneys shall have whatever allowance may be made by the court for the fees of her attorneys, and the third shall be paid a sum named by her out of the alimony awarded, and they accordingly afterwards enter liens, the two upon the allowance for attorneys, and the third upon the decree for alimony, and the judgment is afterwards compromised and receipted in full, the two attorneys entering the discharge of record, and receiving for their own use the entire amount of the court's allowance for fees, the third has no claim upon them for any part thereof; and the fact, that the agreement between the attorneys was kept from the knowledge of the court, is immaterial, the parties in that respect being *in pari delicto*. *Ib.*

6. *Same.—Attorney's Lien for Fees.—Discharge.*—The lien of an attorney for his fees, if validly entered, can not be discharged without his authority, by any act of the judgment plaintiff. *Ib.*
7. *Order of Circuit Court.—Dismissal of Appeal.*—The failure of the defendant to comply with an order of the circuit court, requiring him to pay into court a certain sum of money to enable the plaintiff to prosecute her cause before the Supreme Court, if the same should be appealed by him to that court, affords no sufficient ground for the dismissal of such appeal. *Eastes v. Eastes, 363*
8. *Same.—Practice.—Summons, when Returnable.—Motion to Quash.—Notice.*—The provisions of section 315 of the civil code of 1852, as amended by the act of March 6th, 1877 (Acts of 1877, Reg. Sess., p. 105; section 516, R. S. 1881), in relation to the issue and service of process, have no application to suits or proceedings for divorces; but these are governed by the provisions of the divorce law of March 10th, 1873, 2 R. S. 1876, p. 324; article 37, R. S. 1881. The fact that the summons is issued for a day in term other than the first day will afford no sufficient ground for quashing the writ, but its service will be a sufficient notice of the pendency of the suit for the next ensuing term of the court. *Ib.*
9. *Same.—Affidavit of Plaintiff's Residence and Occupation.—Motion to Dismiss.*—The provisions of the last sentence of section 7 of the divorce law, section 1031, R. S. 1881, in relation to an affidavit of the plaintiff's residence and occupation, are so far mandatory as to require a substantial compliance therewith. But where the objections to such affidavit relate chiefly to formal matters, and a substituted affidavit is filed in substantial conformity with the requirements of the statute, a motion to dismiss or to quash the summons, for the want of a sufficient affidavit, is correctly overruled. *Ib.*
10. *Same.—Cause for Divorce.—Cruel and Inhuman Treatment.—Statute Construed.*—For what constitutes cruel and inhuman treatment of the wife by the husband, within the meaning of the divorce law, see the opinion. *Ib.*
11. *Same.—Admissibility of Evidence.—Failure to Provide.*—Evidence of the husband's failure to provide suitably for the support of his wife and infant child, according to his ability, is admissible as tending to prove that his treatment of his wife is cruel and inhuman. *Ib.*
12. *Same.—Alimony.—Support of Infant Child.*—Allowances for alimony, and for support of infant children, are largely within the discretion of the trial court, and the Supreme Court will not interfere therewith unless a clear abuse of discretion is shown. *Ib.*
13. *Alimony.*—The marriage was the seventh of the husband and the fourth of the wife. They lived together fourteen months. He had property worth \$2,500 and she a house and other property. She went away to visit a sick son by a former marriage, and he to Missouri, and they remained apart; but before the separation she, without reason or ex-

cuse, refused to permit conjugal privileges. He had expended \$26 in repairing her house, allowed her to retain \$130 in household goods, and while they lived together he furnished her a comfortable support. A divorce was decreed to her for abandonment, with \$100 alimony. *Held*, that the alimony was sufficient. *Tumbleson v. Tumbleson*, 558

DOGS.

See CRIMINAL LAW, 1.

DRAINAGE.

See CITY, 5, 9.

EASEMENT.

1. *Prescription*.—*Way of Necessity*.—*Complaint*.—*Evidence*.—Where a complaint to have a right of way declared a permanent easement shows that for more than thirty years plaintiff, and those under whom he claims, have used it under claim of right, having no other way from his land to the highway; that the defendant has denied his right and fenced up the way; and that without the way his land would be of but little value and he would be subjected to great hardships and be deprived of the use of his land as a home, evidence of a way of necessity is admissible. *Steel v. Grigsby*, 184
2. *Private Way*.—*Parol Grant*.—A parol grant of a private way, upon a valuable consideration, where the grant is followed by the grantee's occupation and use of the way for sixteen years, can not be revoked by the grantor or by one claiming under him, upon the ground that the grant rested in parol, or that the way had not been marked out or designated in writing. *Nowlin v. Whipple*, 481

EJECTMENT.

See MORTGAGE, 7.

ENDORSEMENT.

See EVIDENCE, 3, 4; PROMISSORY NOTE, 1.

EQUITY.

See NOTICE; PRINCIPAL AND SURETY, 3.

ESTOPPEL.

See CITY, 12; MARRIED WOMAN, 3; MORTGAGE, 2, 9, 11; PARTITION, 2; RECEIVER, 3; TOWN, 4, 5.

1. *Equitable Estoppel*.—Where both parties meet upon equal terms and possess the same opportunities of knowledge, and there is neither a false statement nor a fraudulent concealment, there can be no equitable estoppel. *Sims v. City of Frankfort*, 446
2. *Same*.—*Pleading*.—*Intendment*.—Where an estoppel is relied upon, it must be pleaded with particularity and precision; nothing can be supplied by intendment. *Ib.*

ESTRAYS.

See CRIMINAL LAW, 13 to 16.

EVIDENCE.

See BILL OF EXCEPTIONS, 1 to 3, 5; BUILDING ASSOCIATION; CRIMINAL LAW, 2, 10, 19, 20, 21; DECEDENTS' ESTATES, 12, 13; DIVORCE, 11; EASEMENT, 1; INSTRUCTION, 6; INTOXICATING LIQUOR; MALICIOUS PROSECUTION, 2; MARRIED WOMAN, 4; MORTGAGE, 8, 27; NEGLIGENCE, 5, 6; NEW TRIAL; PRACTICE, 1, 3; PROMISSORY NOTE, 7, 8; SHERIFF'S SALE, 2; SUPREME COURT, 9, 10, 11, 13; TOWNSHIP TRUSTEE, 4; WILL, 3.

1. *Bankruptcy.—Record of District Court of United States.*—A transcript of a record of a bankruptcy proceeding in the District Court of the United States for the district of Indiana, is admissible in evidence in a court of this State, under section 283, 2 R. S. 1876, p. 150, when proved by the attestation of the keeper of such record and the seal of the court.
Bradford v. Russell, 64
2. *Pleading.—Practice.—Competency.—Personal Property.*—Where the plaintiff sues upon an open account, wherein it is charged that the defendants are indebted to him for certain personal property sold and delivered at a certain price, evidence tending to prove that the property was worth the price charged is competent.
Hillenbrand v. Wittkemper, 180
3. *Promissory Note.—Principal and Surety.—Release.—Alteration of Endorsement.—Extension of Time.*—On trial of an action upon a promissory note, the plaintiff read in evidence the note and an endorsement: "Received October 15th, 1878, forty dollars on the within. F. L. G." The defendant, to sustain an answer of suretyship and release by an extension of time given to the principal, was entitled to give in evidence that part of a conversation between the plaintiff and a competent witness, in which the plaintiff read to him and he himself read the same endorsement, with the added words, "interest to February 23d, 1879."
Mennel v. Grisard, 228
4. *Same.—Possession of Written Instrument.—Endorsements.—Presumption.*—One who owns and has possession of a written instrument is presumed to know its contents and to have made its endorsements, and to know their force and effect.
Id.
5. *Hearsay Evidence.—Vendor's Declaration after Conveyance.—Competency.*—The declarations of a vendor of real estate, made after his conveyance, are not admissible in evidence to affect the title of any one claiming under him.
Stribling v. Brougher, 328
6. *Admissions.*—A witness, on cross examination, denied having made a certain statement inconsistent with her testimony in chief, whereupon a witness of the adverse party was permitted to testify that she so stated.
Held, that it was not error to refuse to permit the adverse party to have his witness repeat this statement, as an admission. Clark v. Rhoads, 348
7. *Tax List.—Replevin.*—In a suit for the recovery of personal property, the tax list, sworn to by a party, showing no claim to the property, is admissible in evidence against him.
Lefever v. Johnson, 554
8. *Former Recovery.*—The best test of identity where a former adjudication of the same matter is pleaded is, would the same evidence sustain both the present and former suit?
Brown v. Cain, 98
9. *Admissions by Silence.*—To affect a party with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence; for, if they were in evidence in a judicial proceeding, he is not to interpose when and how he pleases, though a party, and, therefore, is not concluded. The circumstances must be not only such as afford him an opportunity to act or to speak, but such as would properly and naturally call for some action or reply from men similarly situated.
Johnson v. Holliday, 151

EXECUTION.

See COSTS; FRAUDULENT CONVEYANCE, 5; JUDGMENT, 5 to 7; MISTAKE, 2; REDEMPTION; REPLEVIN BAIL, 3 to 6; SHERIFF; SHERIFF'S SALE.

EXECUTORS.

See DECEDENTS' ESTATE.

EXHIBITS.

See PLEADING, 1, 2, 9; TOWN, 1, 2.

EXTENSION OF TIME.

See EVIDENCE, 3; PRINCIPAL AND SURETY, 1, 9; REPLEVIN BAIL, 4, 5.

FALSE PRETENCES.

See CRIMINAL LAW, 5, 6.

FINDING.

See SPECIAL FINDING; VERDICT, 2, 3.

FORECLOSURE.

See MORTGAGE; VENDOR'S LIEN.

FOREIGN CORPORATION.

See CORPORATIONS; MORTGAGE, 11; PLEADING, 4.

FORFEITURE.

See DEED, 3.

FORGERY.

See CRIMINAL LAW, 19, 20.

FORMER ADJUDICATION.

See EVIDENCE, 8; SPECIAL FINDING, 2.

FORMER RECOVERY.

See EVIDENCE, 8; SPECIAL FINDING, 2.

FRAUD.

See CHATTEL MORTGAGE; CONTRACT, 4 to 7; DECEDENTS' ESTATES, 3; PROMISSORY NOTE, 1; TOWNSHIP TRUSTEE, 6, 7; VENDOR AND PURCHASER.

FRAUDULENT CONVEYANCE.

See CHATTEL MORTGAGE; CONTRACT, 5 to 7; DECEDENTS' ESTATES, 3, 4, 5.

1. *Joinder of Parties.—Judgment Creditors.*—Several judgment creditors may join in an action to set aside conveyances made by their debtor to hinder, delay and defraud them. *Strong v. Taylor School Tp., 208*
2. *Same.—Decedents' Estates.—Administrator of Surety.—Bond.—Principal and Surety.*—The administrator of a deceased surety on an official bond may join in an action to set aside a fraudulent conveyance of his intestate's principal without having paid any money for him. In such case he has an equitable right to have the property of the principal exhausted before resort is had to the estate of the surety represented by him. *Ib.*
3. *Same.—Practice.—Causes of Action.—Complaint.—Separate Paragraphs.*—The fact, that a complaint seeks to set aside two or more conveyances as fraudulent, does not require that each conveyance shall be made the cause of action of a separate paragraph. They constitute but one cause of action, the fraudulent disposition of his property by the judgment debtor. *Ib.*
4. *Same.—Venire de Novo.—Verdict.*—In such case, where the general verdict is for the plaintiffs and specifies the amount due each, finds that their judgments were liens on the debtor's real estate, and that his conveyances thereof were fraudulent, no ambiguity, uncertainty or repugnancy, requiring a *venire de novo*, appears. *Ib.*
5. *Husband and Wife.—Notice.—Execution.—Judgment.—Assignment.—Mortgage.—Vendor and Purchaser.*—In an action to subject lands to the payment of a judgment against L., the facts found specially were, that on

January 3d, 1874, L. and his wife reconveyed the lands to H., the vendor of L., who held a mortgage for \$6,000 purchase-money, and H., at the request of L. and wife, then gave the wife a title bond, conditioned for a deed when she paid H. \$7,000, which was the original purchase price. H. credited her with \$1,000 which L. had paid on the original purchase. H. paid nothing for the conveyance to him. The intention of L. (of which H. had notice) was to defraud the plaintiffs and other creditors, but as to the wife's intention or notice of her husband's intention the finding was silent. The judgment was rendered a few days after the giving of the title bond to the wife, and an execution thereon was levied on the lands, October 22d, 1874. L. had no other property subject to execution. L. furnished his wife \$300 which she paid on the purchase by her from H., but all other payments by her thereon were of her own money—about \$500. After the levy of execution the wife assigned title bond for \$7,500 to C. who assumed her indebtedness to H. and paid or secured to her the balance. C. had no knowledge or notice of any claim of the plaintiffs against L. and wife. The conclusion of law was against the plaintiffs.

Held, that a failure to find that the wife had notice of the fraudulent intent of her husband must, on exception to the conclusion of law, be deemed equivalent to a finding of that matter against the plaintiffs, and that L.'s wife was a *bona fide* purchaser.

Held, also, that her assignee, even with notice, would take free from any claim of the plaintiffs.

Held, also, that the levy of the execution before the purchase by C. was not actual or constructive notice to L.'s wife or to him.

Studabaker v. Langard, 320

6. *Complaint*.—A complaint to set aside a conveyance, on the ground that it was made to defraud creditors, which does not show that the grantor, when the conveyance was made and when the suit was brought, had not other property subject to execution, out of which his debts might have been satisfied, is bad on demurrer. *McCole v. Locher*, 430

7. *Same*.—*Husband and Wife*.—*Notice*.—When the grantee pays nothing, though she be the grantor's wife, it is immaterial whether she had notice of his fraudulent intent or not. *Ib.*

8. *Suit by Grantor's Administrator to Avoid Deed*.—*Sufficiency of Complaint*.—Under the provisions of sections 84, 85 and 86 of the act of June 17th, 1852, providing for the settlement of decedents' estates (sections 2333, 2334 and 2335, R. S. 1881), where the administrator of a deceased grantor sues to avoid the conveyance of his decedent and to subject to sale, for the payment of debts, the real estate conveyed, upon the ground that the deceased, in his lifetime, had transferred the same with intent to defraud his creditors, the record must show that the action was instituted within five years after the death of the decedent, and the complaint must state substantially the same facts, as the decedent's creditors would have been required to allege, if they had sued to set aside the alleged fraudulent conveyance. *Cox v. Hunter*, 590

9. *Same*.—*Pleading*.—In such action, the administrator's complaint must show affirmatively, in order to constitute a cause of action, that the deceased grantor, in the alleged fraudulent conveyance, had no other property for the payment of his existing debts, not only at the time of such conveyance but also at the time of his death and the commencement of the action. *Ib.*

10. *Preference of Creditors*.—A debtor may prefer one creditor over another, and a sale of property for that purpose will not be set aside.

O'Conner v. Coats, 596

11. *Same*.—*Partnership and Individual*.—*Pleading*.—Under a complaint which charges the transfer of property in fraud of creditors generally,

but does not allege a partnership, nor that the demand of the plaintiff arose out of a partnership transaction, no question of priority of right between partnership and individual creditors can arise. *Ib.*

GARNISHEE.

See PROMISSORY NOTE, 9.

GRAVEL ROAD.

1. *Assessments.—Constitutional Law.*—The act of March 2d, 1877, Acts 1877, Reg. Sess., p. 72, reviving the act of May 14th, 1869, and validating gravel road assessments made thereunder, in certain cases, is constitutional. *Searcy v. Patriot, etc., T. P. Co., 274*
2. *Same.—Illegal Assessment.—Act Not Curative.—Statute Construed.*—Said act of March 2d, 1877, is not curative in its provisions, and does not legalize or validate illegal or invalid assessments, but only such as had been made pursuant to the provisions of the gravel road act of May 14th, 1869. *Ib.*
3. *Same.—Judgment Conclusive.—Legislative Power.—Injunction.*—The judgment of a court of competent jurisdiction, perpetually enjoining the collection of certain gravel road assessments, is binding and conclusive upon all the parties thereto until the same is set aside, annulled or reversed by due course of law; and it is not in the power of the General Assembly to set aside or dissolve such injunction, or to authorize the collection of the assessments which the court had declared to be illegal and invalid. *Ib.*

GUARDIAN AND WARD.

See PARTITION, 1; STATUTE OF LIMITATIONS, 1 to 3.

Action to Set Aside Settlement.—Complaint.—A complaint by a guardian against a former guardian showed that the defendant received the sum of \$4,779.84 of his ward's money, that he filed his account in the proper court charging himself therewith and claiming credit for \$1,377.24, and that he had paid the plaintiff, his successor, \$1,159.47 cash and transferred to him a certain note secured by mortgage, "of the present value of \$2,243.13," which covers the whole estate, whereupon he was discharged by the court; that said note was in fact secured only by a junior mortgage on real estate, which was exhausted by the prior incumbrance, and the maker thereof was wholly insolvent, and had been prosecuted by the plaintiff to insolvency; that said account was fraudulent in this, that the defendant had appropriated to his own use of the ward's money said sum of \$2,243.13, and praying judgment that said account and decree of discharge be revoked, etc.

Held, that the complaint, having been filed within three years, was good on demurrer.

Held, also, that it need not show the appointment of the plaintiff as guardian. *Favorite v. Slawter, 562*

GUARDIAN'S SALE.

See PARTITION, 1; STATUTE OF LIMITATIONS, 1 to 3.

GIFT.

See INTOXICATING LIQUOR.

GRANT.

See EASEMENT, 2.

HABEAS CORPUS.

See MASTER COMMISSIONER; CRIMINAL LAW, 21.

HARMLESS ERROR.

See INSTRUCTION, 1, 4, 5, 7, 8; PLEADING, 6; PRINCIPAL AND SURETY, 7, 8; VENDOR'S LIEN.

HEIRS.

See CONTRACT, 5, 6; DEED, 5; WILL.

HIGHWAY.

See CITY, 3 to 12; EASEMENT; PLEADING, 15.

1. *Board of Commissioners.—Jurisdiction.—Report of Reviewers.*—An improper rejection of the report of reviewers appointed by a board of county commissioners in proceedings for the location of a highway does not deprive the board of jurisdiction. *Grimwood v. Macke, 100*
2. *Same.—Jurisdiction.—Collateral Attack.*—Where an inferior tribunal has obtained jurisdiction over the parties in a matter or proceeding, the subject-matter of which it, by law, has or may have jurisdiction, its proceedings thereafter, though irregular or erroneous, are not void. *Id.*
3. *Same.—Appeal.—Trial.—Practice.*—Upon appeal to the circuit court from the final decision of a board of commissioners, in proceedings for the location of a highway, the case must "be heard, tried and determined as an original cause," and, on such hearing, the previous orders of the board and reports of viewers have no significance. *Id.*

HUSBAND AND WIFE.

See DIVORCE; FRAUDULENT CONVEYANCE, 5, 7; JUDGMENT, 12; MARRIED WOMAN, 2 to 5; MORTGAGE, 15; PROMISSORY NOTE, 2; SPECIAL FINDING, 2; VENDOR AND PURCHASER.

Judgment.—Liens.—The liens of judgments obtained on the lands of the husband prior to marriage are paramount to the rights of his wife in the lands. *Exceman v. Finch, 511*

INDICTMENT.

See CRIMINAL LAW.

INFANT.

See DIVORCE, 12; GUARDIAN AND WARD; PARENT AND CHILD; STATUTE OF LIMITATIONS, 2.

INJUNCTION.

See CITY, 4; COSTS, 1, 4; GRAVEL ROAD, 3; RAILROAD, 4; TAXES.

1. An application for an injunction will be denied when it appears that the act sought to be enjoined has already been committed. *Cole v. Duke, 107*
2. *Adequate Remedy by Appeal.*—An injunction will not be granted where the party seeking it has a plain and adequate remedy by appeal. *Sims v. City of Frankfort, 446*
3. *Same.—Performance or Non-Performance of Contract.*—Parties can not, in an injunction suit, litigate a question as to the performance or non-performance of a contract. *Id.*

INSOLVENCY.

See PROMISSORY NOTE, 6, 8.

INSTRUCTION.

See DEED, 4; PRINCIPAL AND SURETY, 8.

1. *Harmless Error.*—Though under supposable facts, of which there was no evidence, an instruction was too broadly stated, yet if in reference to facts proved it could not have misled the jury, the error is harmless. *Carter v. Branson, 14*

2. *Oral and in Writing.—Practice.*—An oral instruction can not be lawfully given when the court has been properly required by a party to give all the instructions in writing. *Bottorff v. Shelton, 98*
3. *Same.—Malicious Prosecution.—Reading Statute an Oral Instruction.*—Upon trial of an action for the malicious prosecution of a criminal action, orally citing and then reading to the jury the statute, 2 R. S. 1876, p. 465, sec. 18, defining malicious prosecution, was an oral instruction, and the court's failure, when it had been required, to reduce it to writing as a part of its written instructions thereupon given, was error. *Ib.*
4. *Expression of Confidence in Jury.—Harmless Error.*—A single instruction, briefly expressing confidence in the prudence and impartiality of the jury, is harmless. *Baltimore, etc., R. R. Co. v. Barnum, 261*
5. *Harmless Error.—Interrogatory.*—An erroneous instruction will not reverse a case, where the answer to an interrogatory propounded to the jury shows that the party was not injured by the instruction. *Moore v. Lynn, 299*
6. *Issue.—Evidence.*—An instruction, which is applicable to the issues and the case made by the evidence, is unobjectionable. *Ryan v. Begein, 356*
7. *Same.—Payment.—Harmless Error.*—The omission of the court, in reciting the issues to the jury, to call their attention to a plea of payment, does not injure the defendant when there is no dispute about the amount paid. *Ib.*
8. *Same.—Counter-Claim.—Married Woman.*—An instruction not to allow the defendant, upon his counter-claim, anything overpaid by him, if the jury shall find that the plaintiff was, at the time, a married woman, if erroneous, was harmless, where the jury did not find that anything was overpaid. *Ib.*
9. *Practice.—Entry by Clerk.*—Instructions can not be made a part of the record by recitals of the clerk entered upon the transcript. *Morrison v. Collier, 417*
10. *Jury.*—It is not the province of the jury to select from contradictory instructions those which correctly express the law. *McCole v. Locher, 430*

INTEREST.

See JUDGMENT, 10; PRINCIPAL AND SURETY, 9; PROMISSORY NOTE, 2, 4; SUPREME COURT, 3.

Contract.—Usury.—A contract for a rate of interest, lawful where the contract is made and where the parties contemplate its enforcement, is valid though the rate of interest exceed that which is allowed at the place fixed for payment. *Pancoat v. Travelers Ins. Co., 172*

INTERROGATORIES.

See INSTRUCTION, 5; NEGLIGENCE, 4.

INTOXICATING LIQUOR.

1. *Gift to Minor.—Evidence.*—Where the indictment charges that the defendant unlawfully gave to a person, under the age of twenty-one years, intoxicating liquor, evidence tending to prove a sale of such liquor, or from which such sale might be inferred, will not authorize the defendant's conviction of the offence charged. *Kurz v. State, 488*
2. *Same.—Evidence.*—In such a case, where the subject of the gift or sale is shown to be beer, it devolves upon the State to prove further, that the beer was either a malt liquor, or was, in fact, intoxicating; otherwise the evidence will not be sufficient to warrant a conviction. *Ib.*

ISSUE.

See INSTRUCTION, 6; JUSTICE OF THE PEACE, 2, 3.

JUDGMENT.

See ALIMONY; CITY, 12; COSTS; DECEDENTS' ESTATES, 13; DEFAULT; FRAUDULENT CONVEYANCE, 5; GRAVEL ROAD, 3; HUSBAND AND WIFE; JURISDICTION, 1, 6; JUSTICE OF THE PEACE, 1; MISTAKE, 2; MORTGAGE, 17, 18; PRACTICE, 5, 10, 11; PROMISSORY NOTE, 9; REAL ESTATE, ACTION TO RECOVER, 2; REDEMPTION, 3; REPLEVIN BAIL; SET-OFF; SUPREME COURT, 12.

1. *Motion to Set Aside.—Notice.—Statute Construed.*—A motion for relief from a judgment under section 99 of the civil code of 1852 (R. S. 1881, section 396) is not such a proceeding as justifies notice to the opposite party by publication in a newspaper, as provided by section 38 of the code of 1852 (R. S. 1881, section 318). *Beck v. Koester, 155*
2. *Action on.—Jurisdiction.*—An action may be maintained on a judgment in the court which rendered it. *Hansford v. Van Auken, 167*
3. *Same.—Replevin Bail.—Defendant by Confession.—Joint Liability.—Complaint.*—In such action against the judgment defendant and his replevin bail, the complaint, on demurrer of the bail for want of facts, need not show a joint liability. It is enough that it shows a cause of action against him by his becoming a judgment defendant by confession. *Ib.*
4. *Same.—“Duly Rendered.”*—A complaint alleging that on the 16th day of March, 1877, in the Porter Circuit Court, the plaintiff's intestate, naming her, recovered a judgment, etc., sufficiently shows that the judgment was “duly rendered,” and when and where. *Ib.*
5. *Same.—Answer.—Execution.—Lien.*—An answer to a complaint on a judgment, averring that the defendant has ample property to satisfy the judgment, but has never been called on for property or money, and that an execution issued on the judgment was returned unsatisfied by order of the plaintiff, but containing no averment that any lien was lost thereby, or that the defendant was prejudiced in any way, is insufficient on demurrer. *Ib.*
6. *Payment.—Lien in Favor of Replevin Bail.—Entry or Return of Satisfaction.—Notice.*—Under the 676th section of the code (R. S. 1881, section 1214), in the case of replevin bail for the stay of execution on a judgment, and in other cases provided for, if the suretyship or other corresponding fact necessary to entitle the party to the benefit of the section, appear of record, an entry or return of satisfaction of the judgment, it not being shown by whom the payment was made, shall not be deemed to extinguish the lien of the judgment, upon the real estate of the judgment debtor, in favor of the replevin bail or other person entitled thereto, if the payment was made by him, as against the grantees of the judgment debtor, though they purchased without actual notice of such lien. *Downey v. Washburn, 242*
7. *Same.—Notice to Purchaser of Real Estate.*—Where the entry or return of satisfaction by the payment of a judgment is silent in respect to the person by whom the payment was made, and the fact is apparent of record that there is a party so related to the judgment as to be entitled to the lien thereof under the 676th section of the code, a purchaser of the land of the judgment debtor is put upon inquiry whether the payment was made by one entitled to keep the judgment alive. *Ib.*
8. *Pleading.—Presumption.*—A complaint upon a judgment of a court of superior jurisdiction need not aver that the judgment was “duly rendered.” Its validity is presumed. *Hansford v. Van Auken, 302*
9. *Misprision.—Motion to Correct not Demurrable.—Practice.*—A motion to correct misprisions in the entry of a judgment is not the proper subject of demurrer. *Conway v. Day, 318*

10. *Same.*—*Power of Court to Correct.*—*Valuation Laws.*—*Rate of Interest.*—When the contract on which a judgment was rendered was such as to require it, the judgment may be so corrected as to be executed without relief from appraisement laws, and as to draw a particular rate of interest. *Ib.*
11. *Same.*—*Supreme Court.*—A judgment may be corrected in respect to misprisions in the entry of it, after it has been affirmed on appeal by the Supreme Court. *Ib.*
12. *Liens.*—The liens of judgments obtained on the lands of the husband prior to marriage are paramount to the rights of his wife in the lands. *Eiceman v. Finch, 511*

JUDICIAL SALE.

See MARRIED WOMAN, 5.

JURISDICTION.

See ALIMONY; HIGHWAY; JUDGMENT, 2, 8; JUSTICE OF THE PEACE.

1. *Judgment.*—*Summons.*—*Collateral Attack.*—*Practice.*—A summons, containing the name and term of the court particularly designated, was sufficient to confer jurisdiction and to sustain a judgment against collateral attack, where the court had acquired jurisdiction of the subject-matter of the action, and the defendant had voluntarily acknowledged service of process. *Stout v. Woods, 108*
2. *Same.*—Where a court is required to, and does, determine a jurisdictional question, its decision can not be collaterally questioned. *Ib.*
3. *Same.*—*Notice.*—Where there has been some notice, however defective, the court's decision that it was sufficient can not be collaterally impeached. *Ib.*
4. *Justice of the Peace.*—The jurisdiction of an inferior tribunal, as that of a justice of the peace, must be shown affirmatively. *Wilkinson v. Moore, 397*
5. *Same.*—*Attachment.*—An attachment is an auxiliary procedure, dependent for its validity upon the jurisdiction of the court in the principal case. *Ib.*
6. *Same.*—*Action on Contract before Justice.*—*Judgment.*—*Collateral Attack.*—An action on contract against a resident of the State, before a justice, unless commenced by *capias*, must be brought in the township of the defendant's residence, if there is a competent justice in such township, and the fact that a writ of attachment has issued, and property has been seized in the township where the suit is brought, does not take the case out of the rule. But if the defendant is served with process, and does not appear to dispute the jurisdiction, the judgment rendered against him or his property can not be questioned collaterally. *Ib.*

JURY.

See INSTRUCTION; PRACTICE, 2.

JUSTICE OF THE PEACE.

See BASTARDY, 1; JURISDICTION, 4, 6; SUPREME COURT, 3.

1. *Judgment.*—*Jurisdiction.*—A judgment of a justice of the peace on default for \$200, where it appears that the note on which it was rendered would, with the interest, exceed \$200, but where it does not appear that the plaintiff claimed more than \$200, nor that there were not credits on the note, can not be held void, for want of jurisdiction. *Brown v. Cain, 93*
2. *Title to Real Estate, When in Issue.*—*Jurisdiction.*—The jurisdiction of a justice in an action for the recovery of possession of real estate is not

ousted by an answer concerning the title, unless it is made evident that the title itself must be tried. *Melloh v. Demott, 502*

3. *Same.*—*Real Estate, Action to Recover.*—*Lease.*—In an action before a justice of the peace for the possession of land, an answer, that, upon foreclosure of a mortgage made by the plaintiff, the sheriff had sold and conveyed to a purchaser, who had made a lease to the defendant, under which he had taken and was holding peaceable possession, does not necessarily bring the title in issue. The facts stated may be confessed and avoided. *Id.*

LANDLORD AND TENANT.

See JUSTICE OF THE PEACE, 3.

Notice to Quit.—*Lease.*—*Rent.*—A parol lease to run until the landlord shall sell the premises at a certain price, the rent to be paid every two months, is good, and on the happening of the contingency the lease terminates, no notice to quit being necessary. *Clark v. Rhoads, 342*

LARCENY.

See CRIMINAL LAW, 1, 11.

LEASE.

See DECEDENTS' ESTATES, 15; JUSTICE OF THE PEACE, 3; LANDLORD AND TENANT.

LEGACY.

See WILL.

LEGAL DISABILITIES.

See STATUTE OF LIMITATIONS, 1 to 3.

LEGISLATURE.

See GRAVEL ROAD, 3.

LICENSE.

See STREET, 1.

LIEN.

See DIVORCE, 3, 6; HUSBAND AND WIFE; JUDGMENT; MARRIED WOMAN, 1; MISTAKE, 2; MORTGAGE; REDEMPTION, 1, 3; REPLEVIN BAIL, 3 to 5; SHERIFF; VENDOR'S LIEN.

LIMITATION OF ACTIONS.

See BASTARDY, 1; FRAUDULENT CONVEYANCE, 8; STATUTE OF LIMITATIONS.

LOST PAPERS.

See BASTARDY, 1.

MAINTENANCE.

See CHAMPERTY; PARTITION, 3.

MALICIOUS PROSECUTION.

See INSTRUCTION, 3.

1. *Want of Probable Cause.*—*Attorney.*—*Demurrer to Evidence.*—On trial of an action for malicious prosecution, in procuring the indictment of the plaintiff for perjury in making an affidavit for the removal of a cause from a justice of the peace to the circuit court, evidence that the defendants were before the grand jury, not of their own motion, but in obedience to legal process, that the deputy prosecutor was attorney for one of the defendants in the civil case, and was familiar with it, and advised them that, if the facts were true as they stated

them to him, there was good cause for a prosecution, was insufficient to show a want of probable cause, and a demurrer thereto was rightly sustained. *Workman v. Shelly, 442*

2. *Same.—Burden of Proof.—Malice.*—In such case, the burden of proof lay upon the plaintiff to show a want of probable cause as well as malice, and a prosecution begun and ended. *Id.*

MANDATE.

See REDEMPTION, 3.

MARRIED WOMAN.

See DIVORCE, 1 to 6; INSTRUCTION, 8; MORTGAGE, 15; PROMISSORY NOTE, 2; REPLEVIN BAIL, 2.

1. *Contract.—Attorney's Fee.—Lien.*—Prior to the act of March 25th, 1879, Acts 1879, p. 160, a married woman could not charge her separate real estate by a contract wherein she agreed to pay for services rendered by an attorney in defending her title thereto, and wherein she agreed that the stipulated sum should be a charge upon the property. *Pierce v. Osman, 259*
2. *Covenants in Deed.—Husband and Wife.—Promissory Note.—Consideration.—Conveyance.—Adverse Possession.*—When a married woman takes a promissory note for a conveyance of her lands, with covenants of general warranty, in which her husband joins, and a portion of the lands described is at the time owned by a stranger in possession, so that the purchaser obtains neither possession nor title thereto, there is a partial failure of the consideration of the note to the extent of the value of that part of the land, notwithstanding the statute, 1 R. S. 1876, p. 363, section 6, which enacts that the wife shall not be bound by such covenants. *Beal v. Beal, 280*
3. *Deed.—Acknowledgment.—Estoppel.*—The deed of a married woman in which she joins her husband, conveying his lands, is good without acknowledgment; and if she hand the deed to the grantee, assuring him that the name signed thereto is her signature, thereby inducing him to accept it, she is bound by it. *Mays v. Hedges, 288*
4. *Same.—Evidence.—Signature.*—Upon the trial of the issue, whether or not a married woman's signature to a deed, also executed by her husband, was made or authorized by her, and there is direct evidence *pro* and *con*, it is error to admit evidence showing that a subsequent purchaser bought in good faith and paid a full and valuable consideration. *Id.*
5. *Mortgage.—Bankrupt.—Judicial Sale.*—Where a wife joins her husband in executing a mortgage of his lands to secure his indebtedness, and then he is adjudged a bankrupt, whereby her inchoate third of his lands becomes absolute under the statute, it is her right, upon foreclosure of the mortgage, to have a decree that the other two-thirds be first sold, if it appear that such two-thirds is of value sufficient to discharge the debt. *Leary v. Shaffer, 567*

MASTER COMMISSIONER.

1. *Constitutional Law.—Habeas Corpus.*—So far as the statute, section 1404, R. S. 1881, confers judicial power on the master commissioner to grant writs of habeas corpus, it is in conflict with the Constitution and therefore void. *Shoultz v. McPheeters, 373*
2. *Same.—Practice.—Supreme Court.*—On appeal from the order of a master commissioner in a proceeding before him in habeas corpus, remanding a prisoner to the custody of the sheriff, the Supreme Court will affirm the judgment. *Id.*

MERGER.

See MORTGAGE, 2; PRINCIPAL AND SURETY, 4.

MINOR.

See INTOXICATING LIQUOR; PARENT AND CHILD; STATUTE OF LIMITATIONS, 1 to 3.

MISJOINDER OF CAUSES.

See SUPREME COURT, 7.

MISPRISION.

See JUDGMENT, 9 to 11.

MISREPRESENTATION.

See CONTRACT, 6.

MISTAKE.

See CONTRACT, 2; COSTS, 4; JUDGMENT, 9; MORTGAGE, 14.

1. *Description of Land in Deed.—Pleading.—Vendor and Purchaser.*—In an action between vendee and vendor to correct a mistake in the description of land, it is enough to show that the parties agreed about and intended the deed to describe a specific piece of property, and that, by their mutual mistake and the mistake of the scrivener, it was not properly described. It is not necessary that the parties shall have agreed upon the particular words to be used, and that by mistake other words were used instead. *Morrison v. Collier, 417*
2. *Same.—Deed.—Correction.—Judgment Lien.—Execution.—Negligence.—Good-Faith Purchaser.*—As between the immediate parties to a deed, a description will be corrected, though the mistake arose from negligence, and one who obtains a judgment lien and an execution against the property is not a purchaser for value, whose rights will be preferred to a vendee who before the date of the judgment had paid the price and received a deed intended, but which by mistake failed, to convey the property. The rule that equity will not aid the negligent does not apply in its fullest sense to the correction of mistakes merely in description of the property contracted about. *Id.*

MISTAKE OF LAW.

See CONTRACT, 2; COSTS, 4.

MORTGAGE.

See BUILDING ASSOCIATION; CHATTEL MORTGAGE; FRAUDULENT CONVEYANCE, 5; MARRIED WOMAN, 5; PARTIES, 2; PRINCIPAL AND SURETY, 3 to 6; PROMISSORY NOTE, 2, 3; REDEMPTION, 3.

1. *Foreclosure.—Instalment Notes.—Assumption of Indebtedness.*—A mortgage which secures several notes maturing at different times, and which has been foreclosed as to the last note falling due, may again be foreclosed for the remaining notes as against a person who has purchased the equity of redemption after the foreclosure, with full knowledge that the prior notes were unpaid, and who assumed to pay them as a part of the purchase-money. *Hill v. Minor, 48*
2. *Same.—Estoppel.—Merger.*—Such person is equitably estopped to insist that the mortgage is merged in the foreclosure proceedings. *Id.*
3. *Foreclosure.—Complaint.*—In a complaint to foreclose a mortgage on real estate, an averment that a defendant has, or claims to have, some interest in the mortgaged premises, is sufficient on demurrer without specifying the interest he has or claims. *Bradford v. Russell, 64*
4. *Same.—Vendor and Purchaser.—Answer.—Reply.—Prior Mortgage.—Bankruptcy.*—Where the answer to such complaint, among other things, avers

that the owner of the land conveyed it to the defendant by warranty deed, and put him in possession thereof, and, becoming bankrupt, the land was sold to pay a prior mortgage and conveyed to one who conveyed it to his grantor, who thereupon executed to plaintiff the mortgage in suit; that his grantor and the plaintiff conspired to defraud him of his title; that the purchase was made in trust for his grantor and the title enured to the benefit of the defendant; that, in an action of ejectment between his grantor and himself, the defendant prevailed; that, in an action against his grantor to quiet his title, the defendant also had judgment,—a reply that the defendant was a party to the decree of foreclosure under which the land was sold to plaintiff, proved his claim in bankruptcy by his oath that he had been dispossessed of the land described in the mortgage, and upon its allowance received his dividend, is good on demurrer. *Id.*

5. *Same.—Title.*—In such case the title so acquired by the grantor does not enure to the benefit of his grantee. *Id.*
6. *Same.—Adverse Possession.*—The possession of the judgment defendant after sheriff's sale is not adverse to the purchaser. *Id.*
7. *Same.—Parties.—Ejectment.*—A mortgagee, who was not a party to actions of ejectment and to quiet title between persons claiming the mortgaged premises, is not bound by the decrees. *Id.*
8. *Same.—Evidence.*—In such case, in his foreclosure proceedings, transcripts of the decrees are not admissible in evidence. *Id.*
9. *Foreclosure.—Mortgagor.—Estoppel.—Title.*—A mortgagor, with covenants for title, is estopped from pleading, to a complaint to foreclose, that he had, when the mortgage was executed, no title to the mortgaged premises, or to a part thereof. *Pancoat v. Travelers Ins. Co., 172*
10. *Same.—Practice.—Parties.*—In a suit to foreclose a mortgage, the refusal of leave to persons claiming title paramount to that of the mortgagor, to become defendants, is not available error. *Id.*
11. *Same.—Estoppel.—Foreign Corporations.—Pleading.*—One who deals with a foreign corporation, by borrowing its money and giving security therefor by mortgage, is estopped from answering in a suit to foreclose, that the plaintiff had "no authority to loan money in Indiana," without showing that by such loan the corporation violated its charter or some law prohibiting the loan. *Id.*
12. *Sufficiency of Description.—County and State.—Presumption.*—Where the mortgagors describe themselves, in the mortgage, as "of Raysville, Henry county, Indiana," and describe the mortgaged real estate as "lying in the northeastern part of the village of Raysville," without naming any county or State, the conclusive presumption will be that the "Raysville," last mentioned, is the one first mentioned and located in the same county and State, and the mortgage is not void for uncertainty as to the county and State in which the mortgaged real estate is situated. *Parker v. Teas, 235*
13. *Same.—Office of Description.—When not Void for Uncertainty.*—The office of the description of real estate, in a mortgage or other instrument, is to locate the premises intended to be embraced therein or affected thereby, with such reasonable certainty as that they can be readily ascertained and possessed; and, where the premises are thus described, the instrument will not be held void for uncertainty in the description. Where the premises are described by given boundaries, and, also, as lying in a certain village, the boundaries will control, and the instrument will not be void for uncertainty, although the land within such boundaries is outside of such village. *Id.*
14. *Same.—Reformation of Mortgage.—Complaint to Reform and Foreclose.—Mistake.*—When the land intended to be mortgaged can be ascer-

- tained by the description in the mortgage, its reformation is unnecessary; and in such case a complaint to correct a supposed mistake in the description, and to foreclose the mortgage, will not be held bad on demurrer, merely because its allegations as to the mistake are not sufficient to entitle the plaintiff to a reformation of the mortgage. *Ib.*
15. *Rents and Profits.—Married Woman.—Satisfaction of Decree.*—It is competent for a married woman, her husband joining with her, to mortgage as well the rents and profits of her real estate, as the real estate itself, for the purpose of securing not only an outstanding debt, but the costs of foreclosure and of the insurance of the mortgaged premises. And where such mortgage is foreclosed, and the premises sold for the payment only of the mortgage debt and interest, the mortgagee and purchaser will be entitled, as against the mortgagor, to the rents and profits of the mortgaged premises, during the year allowed for redemption, for the payment of such costs and insurance, and, until the same are paid, the mortgage and decree will not be *functus officio*, or satisfied. *Chase v. Ball, 311*
 16. *Description.*—The description of real estate in a mortgage, as "all that part of lot number two hundred and thirty-five, described as follows: Fifty-five feet off of the southeast side of lot two hundred and thirty-five, according to the survey by J. and E., of the old Borough of V., bounded in front by M. street, on the northwest by part of the same lot, owned by C. M. A., on the southeast by Sixth street, and in the rear by lot number two hundred and thirty-six, all situate in the city of V., county of," etc., is a sufficient description. *Cook v. Baecher, 338*
 17. *Complaint.—Foreclosure.—Judgment.*—A complaint to foreclose a mortgage and to recover a personal judgment is sufficient, if the facts averred authorize the foreclosure, though they do not authorize a personal judgment. *Searle v. Whipperman, 424*
 18. *Same.—Assignment of Error.—Practice.—Personal Judgment.—Review of Judgment.*—When a personal judgment is rendered upon such complaint, an assignment of error, that the complaint does not state facts, etc., either upon appeal or upon a bill to review, presents no question as to the judgment. If the complaint is sufficient for any purpose, it is sufficient to withstand such assignment, and the remedy for such error is by motion to modify or correct the judgment. *Ib.*
 19. *Foreclosure.—Senior and Junior Mortgages.*—The rights of a junior mortgagee are in no wise affected by the foreclosure of a senior mortgage, unless he is made a party to the foreclosure proceeding. *Catterlin v. Armstrong, 514*
 20. *Same.—Purchaser With Notice of Junior Mortgage Holds as Mortgagor.—Permanent Improvements Subject to Lien.*—The purchaser under the foreclosure of a senior mortgage, having constructive notice of a junior mortgage duly recorded, holds the land as if he had himself mortgaged it, and all buildings and permanent improvements made by him thereon become subject to the lien of the junior mortgage. *Ib.*
 21. *Value of Land.*—In an action by a junior mortgagee against a mortgagor and the purchaser under a foreclosure of the senior mortgage, the value of the land at the time he bought it is not in question. *Ib.*
 22. *Same.—Complaint.*—In an action to foreclose a mortgage as to part only of the property mortgaged, the complaint alleging that the other lands embraced therein had been sold on judgments rendered prior to the date of the mortgage, no error is committed in refusing to require the plaintiff to foreclose as to the tracts so sold. *Ib.*
 23. *Same.—Improvements and Taxes.—Cross Complaint.—Counter-Claim.*—In such action, the purchaser, not being liable for rents and profits, can not by cross complaint require that he be allowed for his improve-

ments and taxes paid, but may by counter-claim ask that upon default of a redemption by either, and on sale, upon foreclosure, the proceeds of the sale be applied first to reimburse him and then in payment of the junior mortgage, and that the surplus, if any, be paid to him. *Ib.*

24. *Same.—Redemption.*—In such case, a finding that the junior mortgagee ought to redeem by paying the purchaser within a fixed time an ascertained amount is contrary to law. A junior mortgagee is under no obligation to redeem the first mortgage. He may foreclose without redeeming. *Ib.*
25. *Same.—Improvements.—Covenant.*—In a suit for foreclosure, the mortgagor is not entitled, as against the mortgagee, to be allowed for improvements made by him on the mortgaged property, unless there be a covenant in the mortgage therefor in case of foreclosure. *Ib.*
26. *Statute of Limitations.*—An action to foreclose a mortgage may be commenced within twenty years after the cause of action accrued. *Ib.*
27. *Parol Evidence.—Indemnity Mortgage.—Payments.*—In an action to foreclose an indemnity mortgage, parol evidence is admissible to prove payments made upon notes set forth and described in the mortgage, without producing or accounting for the notes. *Ib.*

MUNICIPAL CORPORATIONS.

See CITY; STATUTE OF LIMITATIONS, 4; STREET; TOWN.

NEGLIGENCE.

See CITY, 2, 9, 11; MISTAKE, 2.

1. *Railroad.—Injury by Fire from Locomotive.—Complaint.*—A complaint against a railroad company for injury to property, consisting of growing grass and stacks of hay and straw, caused by coals and sparks from a locomotive setting fire to dry grass, weeds, rubbish and other combustibles negligently suffered to gather on the company's right of way, and communicated to plaintiff's land "by the medium" of such combustibles, is insufficient without an allegation that the fire was permitted to escape upon the plaintiff's land by the fault and negligence of the company. *Pittsburgh, etc., R. W. Co. v. Hixon, 111*
2. *Same.—Answer.—Contributory Negligence.*—It is not a sufficient answer to such complaint, even if amended by supplying such allegation, that the plaintiff was guilty of negligence contributing to the injury by permitting grass, weeds and rubbish to accumulate on his own land adjoining the company's right of way, by means of which the fires were communicated to his property. *Ib.*
3. *Same.—Practice.—Demurrer to Bad Answer Carried Back.—Complaint.*—In such case, a demurrer to such bad answer should have been carried back and sustained to the complaint. *Ib.*
4. *Same.—Interrogatories.—General Verdict.*—In such case, answers to interrogatories, showing that there was dry grass on the plaintiff's lands, which grass was burned by the fire, and in burning spread the fire over the land, are not inconsistent with a general verdict for the plaintiff, and show no defence to his action. *Ib.*
5. *Same.—Damages.—Opinion of Witness.—Evidence.*—On trial of such action, it was error to permit a witness, over objection, to state, in answer to the question, "What was the damage per acre?" that "The damage was from three to four dollars per acre." *Ib.*
6. *Same.—Presumption.—Evidence.—Rebuttal.*—On such trial, it was error to refuse to allow the company to rebut the presumption of negligence by proving that the locomotive engines of the company were provided with the best methods known for the prevention of fire, and that they were in good order and repair and skilfully managed, at the time complained of. *Ib.*

7. *Intervening Agency*.—Where the negligence of the defendant is the cause of an injury, an action will lie, although there may have been some intervening agency. *City of Crawfordville v. Smith, 308*

NEW TRIAL.

See COSTS, 3; PRACTICE, 19; VERDICT, 2.

1. *Newly Discovered Evidence*.—*Diligence*.—*Practice*.—*Proof of Complaint*.—Upon the hearing of a complaint for a new trial, under section 356, 2 R. S. 1876, p. 183, the plaintiff should produce in evidence the record of the former trial and the evidence then given, with the newly discovered evidence pleaded, and prove that it was discovered after the term, and show what diligence he had used to procure the same at the former trial. *Kitch v. Oatis, 96*
2. *Same*.—*Bill of Exceptions*.—*Supreme Court*.—In such case, the evidence produced by the parties at the hearing and summary decision should be incorporated in the record by a bill of exceptions, to enable the Supreme Court to determine the correctness of the decision of the trial court in granting or refusing the new trial. *Id.*
3. *Newly Discovered Evidence*.—Newly discovered evidence which is merely cumulative, *i. e.*, of the same kind and to the same point, is no cause for a new trial. *Lefever v. Johnson, 554*
4. *Same*.—*Bill of Exceptions*.—*Affidavits*.—*Record*.—Affidavits in support of a motion for a new trial can come into the record only by bill of exceptions or order of court. *Id.*

NON COMPOS MENTIS.

See DEED, 4, 5.

NOTICE.

See CITY, 11; DIVORCE, 8; FRAUDULENT CONVEYANCE, 5, 7; JUDGMENT, 1, 6, 7; JURISDICTION, 1 to 3; LANDLORD AND TENANT; MORTGAGE, 20; PRACTICE, 16; PRINCIPAL AND SURETY, 5; PROMISSORY NOTE, 9; SHERIFF'S SALE, 1.

Equity.—*Vendor and Purchaser*.—One who, with notice of an equity, purchases the estate of one who has no notice, ordinarily takes the estate discharged from the equity; but if, having notice, he first sells the estate and then buys it back, the case is an exception to the rule.

Durham v. Craig, 117

NUISANCE.

See CITY, 10.

OFFICE AND OFFICERS.

See CITY, 1, 6, 8; COSTS, 2; HIGHWAY; SCHOOL LAW; SHERIFF; TOWN, 1, 5; TOWNSHIP TRUSTEE.

OPINION.

See NEGLIGENCE, 5.

ORDINANCE.

See PRACTICE, 5; STREET, 2.

QUESTION OF FACT.

See CHATTEL MORTGAGE, 1; CRIMINAL LAW, 6.

PARENT AND CHILD.

Minor's Earnings.—A father may emancipate his minor child from service to him, and thereafter the child has a right to his own earnings, and may recover wages from the father as from a stranger, as if he had arrived at full age. *Wright v. Dean, 407*

PAROL EVIDENCE.

See MORTGAGE, 27.

PARTIES.

See FRAUDULENT CONVEYANCE, 1 to 4; MORTGAGE, 7, 10, 19; PLEADING, 11; RECEIVER, 1; REPLEVIN.

1. *Pleading.—Contract.—Assignment.*—A complaint on a written contract assigned in writing, but not by indorsement, is, under the statute (R. S. 1881, section 276), bad on demurrer, unless the assignor be made a defendant thereto. *Gordon v. Carter, 386*
2. *Vendee of Mortgagor.*—In an action to foreclose the mortgage, the vendee of the mortgagor is a proper and necessary party, if he accepts the conveyance, though he does not take possession, of the property. *Searle v. Whipperman, 424*

PARTITION.

1. *Complaint.—Title.—Guardian's Sale.*—A complaint for partition which is otherwise good is not bad because it avers that the defendants claim title to the plaintiff's share through a guardian's sale which was not ordered nor approved by the court. *White v. Clawson, 188*
2. *Estoppel.—Vendor and Purchaser.—Adverse Possession.*—An answer in partition, that the defendant had purchased the lands in good faith and for a valuable consideration, and that before such purchase, and before any conveyance to the plaintiff, the grantor of the plaintiff informed him that he had no interest in the land, by reason whereof and relying thereon, the defendant purchased and was in possession adverse to all others, and claiming as owner when the plaintiff took conveyance, is insufficient on demurrer. *Patterson v. Nixon, 251*
3. *Same.—Champerty.—Tenants in Common.—Conveyance.*—The possession of a tenant in common of lands, who has ousted his co-tenant, and holds adversely to him, does not impair a conveyance by the latter of his share, the doctrine of *champerty* having no application to such cases. *Ib.*

PARTNERSHIP.

See FRAUDULENT CONVEYANCE, 11; RECEIVER.

PAYMENT.

See COSTS, 3, 4; INSTRUCTION, 7; JUDGMENT, 6, 7; MORTGAGE, 27; PROMISSORY NOTE, 9.

PERFORMANCE.

See STATUTE OF FRAUDS.

PERSONAL PROPERTY.

See CORPORATIONS; DECEDENTS' ESTATES, 15; EVIDENCE, 2.

PLEADING.

- See BASTARDY, 1; BUILDING ASSOCIATION; CHATTEL MORTGAGE, 2; CITY, 4, 11; CONTRACT, 2, 5; DECEDENTS' ESTATES, 3, 4; DEED, 5; EASEMENT, 1; ESTOPPEL, 2; EVIDENCE, 2; FRAUDULENT CONVEYANCE; GUARDIAN AND WARD; JUDGMENT, 3 to 5, 8; MISTAKE, 1; MORTGAGE, 3, 4, 11, 14, 17, 22, 23; NEGLIGENCE, 1, 2; PARTIES; PARTITION, 1, 2; PRACTICE, 5, 7, 9, 12 to 15, 17, 18, 20; PROMISSORY NOTE, 2, 6, 9; RECEIVER; REDEMPTION, 4; TOWN, 1, 2; TRESPASS, 1.
1. *Copy of Writing.*—A writing which is not the foundation of the action or defence should not be copied into the complaint or answer, and, if so copied, it neither adds to nor takes from the force of the averments of the pleading. *Carter v. Branson, 14*

2. *Amendment.—Practice.*—A pleading may be amended by filing an amendment thereto, without re-writing the whole pleading; and in such case the original pleading and the amendment will constitute the amended pleading. *Eigenman v. Rockport, etc., Association, 41*
3. *Copy of Written Instrument.—Variance.*—Where there is a variance between the allegations of a pleading founded on a written instrument, in regard to its contents, and the copy of the instrument therewith filed, the copy will control and will be presumed to be right, until the contrary is shown. *Parker v. Teas, 255*
4. *Foreign Corporations.—Answer in Abatement.—Plea in Bar.*—In an action by a foreign corporation on a contract made with it, an answer under oath, that "the plaintiff had not complied with the provisions of an act of the General Assembly" respecting foreign corporations, lacks the precision and certainty of a plea in abatement, and, stating not facts but a conclusion only, is insufficient to bar the action. *Singer, etc., Co., v. Effinger, 264*
5. *Answer.—Practice.*—An answer which commences as being general but answers only a part, and in the conclusion purports to be pleaded only as an answer to such part, is not to be regarded as pleaded to the whole complaint, and is good on demurrer. *Beal v. Beal, 280*
6. *Argumentative Denial.—Harmless Error.*—An argumentative denial is not bad on demurrer, but if the general denial be also pleaded, to sustain the demurrer is a harmless error. *Mays v. Hedge, 288*
7. *Complaint of Several Paragraphs.—Joint or Several Demurrer.—Practice.*—Where "The defendant demurs to the first, second and third paragraphs of the complaint, each separately, for the reason that neither paragraph, separately considered, states facts sufficient to constitute a cause of action," the demurrer is not joint, but is separate and several, and will test the sufficiency of the facts in each paragraph of complaint. *Stribling v. Brougher, 328*
8. *Same.—Numbering Causes of Demurrer.—Waiver.—Supreme Court.*—Where only one ground of objection to a pleading is assigned in the demurrer thereto, it need not be numbered; but if two or more grounds of objection are specified in the demurrer, the statute provides that, unless the grounds be numbered, the demurrer "shall be overruled." This statutory provision is for the benefit of, and may be waived by, the adverse party; and unless the record shows an objection in the circuit court to the demurrer, upon the ground that the several causes therefor were not numbered, the objection will be considered as waived, by the Supreme Court. *Id.*
9. *Same.—Complaint to Quiet Title and Set Aside Deed.—Copy of Deed.*—In a complaint to quiet the title to real estate and to set aside a deed, the action is not founded upon the deed, and a copy of the deed is not a necessary part of the complaint. *Id.*
10. *Same.—Prayer for Relief.—Demurrer.*—A demurrer to a complaint for the want of sufficient facts will not reach a defect, if any exists, in the prayer for relief. *Id.*
11. *Complaint.—Parties.*—A complaint that does not show a right of action in favor of all the plaintiffs is insufficient on a demurrer for want of facts. *Schee v. Wiseman, 389*
12. *Complaint.—"Due and Unpaid."*—That a sum of money is "due and unpaid," is sufficiently shown by a complaint, if it appear thereby that the event upon which it was to be paid has occurred, and that the defendant is indebted to the plaintiff in that sum. *Humphrey v. Fair, 410*
13. The character of a pleading must be determined by its averments and not by the name given it. *Searle v. Whipperman, 424*

14. *Material Facts*.—Material facts essential to the existence of a cause of action should be positively alleged, and not left to be gathered by mere conjecture; nor should they be stated by way of recital.
Cummins v. City of Seymour, 491
15. *Same*.—*Obstruction of Highway*.—That the obstruction of a highway, complained of by an abutter, is permanent, is a fact material to his cause of action.
Ib.

PRACTICE.

- See ASSIGNMENT OF ERROR; COSTS, 2; CRIMINAL LAW, 3, 7, 9; DEFAULT; DIVORCE, 7, 8, 9; FRAUDULENT CONVEYANCE, 1, 3, 4; HIGHWAY, 3; INSTRUCTION; JUDGMENT, 9 to 11; JURISDICTION, 1; MORTGAGE, 10, 18; NEGLIGENCE, 3; NEW TRIAL; PLEADING, 1, 2, 5, 7, 8, 10; REAL ESTATE, ACTION TO RECOVER, 1; REFLEVIN BAIL, 1; SPECIAL FINDING; SUPREME COURT; VENDOR'S LIEN; VERDICT; WITNESS.
1. *Preponderance of Evidence*.—*Number of Witnesses*.—The preponderance of evidence is not to be determined by the number of witnesses; and, in all cases, the credibility of the witnesses is a question for the determination of the jury or of the trial court. *Johnson v. Holliday, 151*
 2. *Same*.—*Challenge of Juror for Cause*.—*Bill of Exceptions*.—No available error can be predicated upon the decision of the trial court, in overruling the challenge of a juror for cause, unless the record affirmatively shows, by bill of exceptions or order of court, that it contains the full and complete examination of the juror, on his *voir dire*. *Ib.*
 3. *Same*.—*Evidence*.—*Admissions by Silence*.—To affect a party with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence; for, if they were in evidence in a judicial proceeding, he is not at liberty to interpose when and how he pleases, though a party, and, therefore, is not concluded. The circumstances must be not only such as afford him an opportunity to act or to speak, but such as would properly and naturally call for some action or reply from men similarly situated. *Ib.*
 4. *Court Rule*.—*Costs*.—A rule of court providing that "motions to require security for costs must be made at the first calling of the docket, unless the affidavit upon which the motion is based shows that the plaintiff's non-residence was not known to the defendant or his attorney, and that it is made as soon as the fact comes to his knowledge," is valid. *Pancoast v. Travelers Ins. Co., 178*
 5. *Motion in Arrest*.—*Complaint*.—*Town Ordinance*.—*Judgment*.—A judgment in favor of the plaintiff upon a complaint consisting entirely of a copy of a section of a town ordinance, unaided by any averment, should on motion have been arrested. *Long v. Town of Brookston, 183*
 6. *Open and Close*.—*Principal and Surety*.—In an action against a principal and his surety upon an obligation which showed on its face the suretyship, the principal answered by a general denial, and the surety by pleas in confession and avoidance only.
Held, that the plaintiffs were entitled to open and close. The general rule is, that the open and close belongs to the one who in order to prevail must offer proof; to the plaintiff, if upon any issue joined upon his complaint he has the burden of proof. *Kirkpatrick v. Armstrong, 384*
 7. *Same*.—*Pleading*.—In such action an answer by the principal enures to the benefit of the surety. *Ib.*
 8. *Bill of Exceptions*.—*Record*.—When a bill of exceptions is not filed at the time, the record, *dehors* the bill, must show that time was given. It is not sufficient that it be shown only by the bill of exceptions itself.
Applegate v. White, 413

9. *Pleading.—Complaint Cured by Verdict.*—A cause of action, though defectively stated, if not tested by demurrer, will be upheld after verdict. *Morrison v. Collier, 417*
10. *Judgment.—Default.—Appeal.—Review of Judgment.*—An appeal may be taken, or a bill to review will lie, from a judgment taken by default without first making a motion to set aside the default. *Searle v. Whipperman, 424*
11. *Same.—Motion to Set Aside Default.—Judgment.*—No question that depends upon a motion to set aside a default or to modify the judgment will arise upon an appeal, or upon a bill to review, unless such motion was made. The bill itself will not subserve such purpose. *Ib.*
12. *Bad Answer.—Demurrer Overruled.—General Denial.*—Where a demurrer is overruled to a bad answer, the court holds that to be a bar which is not a defence, and the fact that the general denial is also pleaded does not render the ruling immaterial. *Sims v. City of Frankfort, 446*
13. *Good and Bad Paragraphs.—Motion in Arrest.—Verdict.*—If one of two or more paragraphs of complaint is good, and there is a general verdict for the plaintiff, a motion in arrest can not be sustained, nor error assigned, for want of facts stated in the complaint or in any paragraph, especially where the answers to interrogatories show that the verdict rests in part at least on the good paragraph. *Terrell v. Frazier, 473*
14. *Uncertainty in Pleading.*—Uncertainty in the allegations of a pleading can not be reached by a demurrer for the want of facts, but only by motion to make more specific. *Nowlin v. Whipple, 481*
15. *Prayer for Relief.—Demurrer.*—A complaint will not be held bad on demurrer for the want of facts, if the facts stated show that the plaintiff is entitled to some relief, though it may be different from the relief demanded. A prayer for relief is not the subject of demurrer. *Ib.*
16. *Inspection of Papers.—Notice.*—Due notice of a motion for an order granting an inspection of papers is necessary. *Catterlin v. Armstrong, 514*
17. *Pleading.—Counter-Claim.*—Where the facts set up in a cross complaint are in no way connected with, or dependent upon, the matters alleged in the complaint, no available error is committed in dismissing such cross complaint. *Sterne v. First National Bank, etc., 560*
Sterne v. Vincennes National Bank, 598
18. *Summons.—Service.—Continuance.—Divorce.*—A failure to serve the summons, under section 13 of the act concerning divorces, ten days before the first day of the term of court, is no cause for setting aside the service or quashing the writ, but merely a cause for a continuance of the case. *Bratton v. Bratton, 588*
19. *Same.—Continuance.—New Trial.—Supreme Court.*—The refusal of the court to grant a continuance must be assigned as a cause for a new trial, to present any question thereon in the Supreme Court. *Ib.*
20. *Defective Complaint.—Failure to Demur.—Waiver.—Verdict.*—Where necessary facts are defectively alleged, and no objection has been taken thereto by motion or demurrer, it may sometimes be said that the defects have been obviated by evidence and cured by the verdict; but where the complaint entirely omits allegations of material facts, necessary to the maintenance of the action, such allegations can not be supplied by evidence, nor can their omission be cured by verdict, nor is the objection waived by a failure to demur. *Cox v. Hunter, 590*
21. No error is committed in overruling a demurrer addressed generally to an answer consisting of the general denial and a special paragraph of answer. *State, ex rel, v. Price, 599*

PREFERRED CREDITORS.

See FRAUDULENT CONVEYANCE, 10, 11.

PRESCRIPTION.

See ADVERSE POSSESSION; CITY, 4; EASEMENT.

PRESUMPTION.

See CITY, 8; EVIDENCE, 4; JUDGMENT, 8; MORTGAGE, 12; NEGLIGENCE, 6; PROMISSORY NOTE, 5; STREET, 3; TOWN, 3.

PRINCIPAL AND AGENT.

See PRINCIPAL AND SURETY, 6; PROMISSORY NOTE, 10.

PRINCIPAL AND SURETY.

See EVIDENCE, 3; FRAUDULENT CONVEYANCE, 2; JUDGMENT, 6; PRACTICE, 6, 7; REFLEVIN BAIL; TOWNSHIP TRUSTEE.

1. *Contract for Extension of Time.*—The assent of a surety that the creditor may give time to the principal, upon condition that the latter will perform certain stipulations within a definite time, must, as to time, be performed by the principal strictly according to its letter, or the surety will be discharged. *Cartmel v. Newton, 1*
2. *Same.—Construction of Contract.—Discharge of Surety.—Time.*—A surety consented in writing that upon the principal securing to the creditor in a certain manner, within ten days, one-fourth of the indebtedness, the creditor might discharge him from the whole debt, and hold the surety for the remainder. The principal assented to the terms proposed within ten days, but did not give the securities provided for until afterwards.
Held, that, on behalf of the surety, time was of the essence of the contract, and he was therefore wholly discharged. *Ib.*
3. *Mortgage.—Subrogation.—Equity.*—A mortgage by the principal debtor to the surety, with condition that the mortgagor shall pay the debt, and that the surety shall be indemnified, is in equity available to the creditor, and he may resort to the mortgaged property for the satisfaction of his debt. *Durham v. Craig, 117*
4. *Same.—Merger.—Satisfaction.*—The subsequent purchase, by the surety, of the property mortgaged, does not merge the mortgage as against the creditor, nor can the surety enter satisfaction of it. *Ib.*
5. *Same.—Notice.*—If such mortgage be duly recorded, the record charges all subsequent purchasers and mortgagees of the property with notice of the rights of the creditor. *Ib.*
6. *Same.—Principal and Agent.—Trust and Trustee.*—Where an agent, making a loan of money for his principal, takes a mortgage to secure the loan in his own name, instead of that of the principal, he is in equity regarded as holding the mortgage in trust for the principal. *Ib.*
7. *Promissory Note.—Vendor's Lien.—Deposition.—Harmless Error.*—In an action upon notes, signed by A. and B., the latter "as security," and to enforce a vendor's lien, it is a harmless error to suppress a deposition which alone tends to prove that B. signed as principal and not as security, in order to show that the vendor's lien was not waived, where the jury find that the notes have been paid. *Moore v. Lynn, 299*
8. *Same.—Harmless Instruction.*—An instruction, which directs the jury to find for the defendants in case they find B. signed as surety, is harmless where they find that the notes have been paid. *Ib.*
9. *Promissory Note.—Extension of Time.—Release of Surety.—Consideration.—Interest.*—A contract for an extension of time for the payment of a note by the principal and payee, made upon a valuable consideration and without the consent of the surety, will release him, and the payment of interest in advance for a definite period is such valuable consideration. *Kaler v. Hise, 301*

PROMISSORY NOTE.

See EVIDENCE, 3; MARRIED WOMAN, 2; MORTGAGE, 1, 27; PRINCIPAL AND SURETY, 7, 9.

1. *Commercial Paper.—Endorser and Endorsee.—Consideration.—Fraud.*—One who carelessly executes commercial paper, which he can not read, being deceived by the payee as to its character, and therefore supposing it to be an instrument wholly different, when, by reasonable care, he might have ascertained the true contents of the paper, can not make defence as to the consideration, against an innocent holder for value, who received the paper by endorsement, before maturity.
Williams v. Stoll, 80
2. *Alteration.—Answer.—Married Woman.—Mortgage.*—A verified separate answer of a married woman, that, with her husband, she executed the mortgage sued on to secure three notes; that one was paid; and that the other two, after their delivery to the payee, were unlawfully, and without her knowledge or consent, fraudulently altered by inserting in the body thereof "at ten per cent. interest," is good on demurrer.
Bowman v. Mitchell, 84
3. *Same.*—Whatever discharges a note discharges a mortgage securing it.
Id.
4. *Same.—Material Alteration.—Interest.*—A material alteration of a note or other written instrument, by one who claims the benefit of it, made without the consent of the party against whom it is to be enforced, renders it void; and inserting in a note a higher rate of interest than it provides for is a material alteration.
Id.
5. *Same.—Presumption.*—The presumption is that a material alteration, made after the execution of a note or other written instrument, was made by the party claiming under it, or by one under whom he claims.
Id.
6. *Endorser.—Diligence.—Insolvency.—Complaint.*—In a complaint against the endorser of a promissory note, an allegation that the maker, at the time the note matured, was, and until the commencement of the action continued to be, totally insolvent, having no property subject to execution out of which his claim could be made, shows a sufficient excuse for plaintiff's delay in proceeding against the maker.
Gwin v. Moore, 103
7. *Same.—Evidence.—Reasonable Diligence.*—In such action, evidence that the note sued on was endorsed and delivered to the plaintiffs April 18th, 1875, and became due June 20th, 1876; that in an action commenced against the maker April 26th, 1877, judgment was recovered June 2d, 1877; execution issued November 7th, 1877, and return thereof made February 1st, 1878; that no property of any description could be found whereon to levy, shows an entire want of the reasonable diligence required to charge the defendant as an endorser.
Id.
8. *Same.—Insolvency of Maker.—Evidence.—Verdict.*—In such case, evidence tending to show that the maker was actually insolvent, and that an action against him commenced within a reasonable time after the maturity of the note and prosecuted with diligence would have been unavailing, will sustain a verdict against the endorser.
Id.
9. *Pleading.—Assignment.—Payment.—Judgment.—Notice.—Garnishee.*—Suit on a promissory note by the assignee against the maker. Answer, that before notice of the assignment the defendant had paid the note by paying a judgment regularly rendered against him as garnishee in a suit against the payee. Reply, that before payment of the judgment the defendant had notice of the assignment; that he had executed to the payee another note of \$600, which the payee held after the assignment of the note in suit; and praying that so much of the payments made as garnishee as would satisfy that note be applied thereon, and

that only the balance of such payments, if any, be applied on the note in suit.

Held, that the reply was bad on demurrer. *Newman v. Manning*, 218

10. *Maker.—Signature.—Principal and Agent.—Corporation.*—The directors of the Howard County Agricultural Association gave a note in which were the words "on," etc., "The Howard County Agricultural Association, who execute this note by her directors, do promise to pay," etc. Signed by T. M. K., A. L. S. "Secretary," and others, followed by the words "Directors Howard County Agricultural Association."

Held, that the note was that of the association and not of the individuals whose names are signed thereto. *Armstrong v. Kirkpatrick*, 527

RAILROAD.

See CORPORATIONS, 2; CRIMINAL LAW, 12; NEGLIGENCE.

1. *Appropriation to Aid.—Statutes Construed.*—The power of counties and townships to vote aid to railroad companies is conferred and regulated by the act of May 12th, 1869, and the supplemental and amendatory acts of January 30th, 1873, and March 11th, 1875. *Peed v. Millikan*, 86
2. *Same.—Tax.—Levy.—Percentage on Gross Sum.*—The levy of a tax in aid of a railroad company is not void because made in the shape of a percentage instead of a gross sum. *Id.*
3. *Same.—Defective Levy.—County Commissioners.—Power to Correct.*—If the order for the levy of a tax voted in aid of a railroad company is defective, it may be corrected at any time by the board of commissioners on application, or of its own motion. Though the law requires the levy to be made at the June session next after the vote, the duty to make it is absolute, and consequently the power to make it is not lost by a failure to exercise it at the right time. *Id.*
4. *Same.—Tax Placed on Duplicate Too Soon Enjoined.*—The law forbids the placing of a tax levy in aid of a railroad company upon the duplicate until the road has been permanently located in the county or township which voted the same; and the collection thereof may be enjoined and the levy ordered stricken from the duplicate, notwithstanding the road may have been since located in the county or township which voted the aid. *Id.*
5. *Same.—Power of Auditor and Treasurer to Suspend Tax.*—The provisions of the laws whereby the auditor and treasurer are required to suspend the collection, and to carry the tax forward until the road has been located and money expended, etc., have reference to levies which had gone upon the duplicate before the inhibition against placing the tax on the duplicate until the road has been located was enacted. *Id.*

REAL ESTATE, ACTION TO RECOVER.

See COSTS, 3; JUSTICE OF THE PEACE, 2, 3; STATUTE OF LIMITATIONS, 1 to 3; WILL, 3.

1. *Practice.*—In an action for the recovery of possession of real property, no error is committed in striking out a special paragraph of answer when there is on file an answer of general denial; for under that all defences to the action may be given. *Wood v. Eckhouse*, 354
2. *Same.—Costs.—Judgment.*—In such action, it is not error to render a judgment for costs collectible without relief from appraisement laws. *Id.*

RECEIPT.

See TOWNSHIP TRUSTEE, 5 to 7.

RECEIVER.

1. *Appointment.—Partnership.—Pleading.—Vendor's Lien.—Parties.*—In an action by a receiver of partnership property to foreclose a vendor's

lien on real estate which he had sold, an answer to the effect that one of the co-partners was not a party to the proceeding in which the appointment of the receiver was made, but not showing that such co-partner was at the time alive and within the jurisdiction of the court which appointed the receiver, nor that he had a substantial interest in the partnership, is not good. *Stetler v. LaRose*, 435

2. *Same.—Plea of No Consideration.*—If in such case the answer showed that the appointment of the receiver and the sale of the realty were void, it would be a want of consideration, provable under a plea of no consideration, also pleaded. *Ib.*
3. *Same.—Estoppel.—Collateral Attack.*—The vendee of a receiver who has given his note to the receiver for the purchase-money and has accepted, and holds possession under, the receiver's deed, can not, in the absence of fraud or mistake, deny the validity of the receiver's appointment. *Ib.*

RECORD.

See BILL OF EXCEPTIONS, 7, 8; CRIMINAL LAW, 9 to 11, 18; NEW TRIAL, 4; PRACTICE, 8; SUPREME COURT, 6, 15.

REDEMPTION.

See MORTGAGE, 24.

1. *Execution.—Liens.—Statute Construed.*—The law concerning the priority of liens, as it existed before the act of 1879, providing for the redemption of real estate from sheriff's sales (Acts 1879, p. 176), was not changed by that act. *Duke v. Beeson*, 24
2. *Same.—Sheriff's Sales.—Application of Proceeds.*—The requirement of section 5 of the act of 1879, that upon a sheriff's sale, on behalf of a redemptioner, the proceeds shall be first applied to pay "the amount due for redemption," must be construed in connection with, and be controlled by, section 3 of said act, which positively preserves the priority of liens, so that though a second redemptioner must pay not only the redemption money paid by the first, with interest and costs, but also the debt, interest and costs, by virtue of which the latter was enabled to redeem, yet no priority for the latter sum would accrue over any older lien held by a creditor who had not redeemed, and the second redemptioner could not demand that the proceeds of his sale should be applied thereto in preference to such older lien. *Ib.*
3. *Same.—Mandate.—Mortgage and Judgment Liens.*—A mortgage, being the oldest lien, was foreclosed, and the real estate sold, leaving a portion of the judgment unsatisfied. A., the holder of a judgment lien next in priority, redeemed, and from him B., a holder of a junior judgment lien, who paid the redemption money, interest and costs paid by A., and also the amount of A.'s judgment. B. then sued out an execution on his judgment, with the proper recital of the several redemptions. The sheriff, holding also an execution for the balance of the mortgage debt, sold in regular form upon B.'s execution, and the holder of the mortgage debt became the purchaser; he tendered to the sheriff, in cash, the amount of the original redemption money with interest and costs, which had been paid by B. on account of the first sale, and, for the residue of his bid, tendered his receipt to apply on his execution in the sheriff's hands, it being the oldest lien. The sheriff refused the receipt, as also to execute a deed or certificate of purchase to him. *Held*, that a mandate should go against the sheriff, to compel him. *Ib.*
4. *Complaint.—Payment of Purchase-Money.*—A complaint for the redemption of land sold upon foreclosure of a mortgage, which does not allege that the purchase-money and ten per centum interest have been paid to the clerk, is insufficient. *Biceman v. Finch*, 511

5. *Same.—Undivided Interest.*—The owner of an undivided interest may not redeem it only, but must redeem the entire parcel. *Ib.*
6. *Same.—Statute, Compliance With.*—One who seeks the benefit of the statute giving a right of redemption must fully comply with its requirements. *Ib.*
7. *Same.—Statutory Right.*—The general equitable right of redemption is forever barred by the decree and sale; the statutory right springs into existence with the sale, continues for one year and then expires. *Ib.*

REMAINDER-MAN.

See WILL, 4.

REMITTITUR.

See SUPREME COURT, 4.

RENT.

See LANDLORD AND TENANT; MORTGAGE, 15.

RENTS AND PROFITS.

See MORTGAGE, 15; VENDOR AND PURCHASER; WILL, 4.

REPLEVIN.

See EVIDENCE, 7.

Chattel Mortgage.—Parties.—Assignment for Benefit of Creditors.—In replevin by a mortgagee of chattels against a trustee under an assignment by the mortgagor for the benefit of creditors, a creditor as such is not a proper defendant, and it is error to admit him as a defendant.

Antrim v. Gilson, 359

REPLEVIN BAIL.

See JUDGMENT, 3, 6, 7.

1. *Discharge of.—Motion.—Practice.*—A discharge from a recognizance of replevin bail may be obtained upon proper cause shown, by motion in the court which rendered the judgment. *Eberwine v. State, ex rel., 266*
2. *Same.—Married Woman.*—A married woman is incapable of binding herself by a recognizance of replevin bail, and, having signed such contract, may be discharged therefrom on motion in the court where the judgment was rendered. *Ib.*
3. *Principal and Surety.—Judgment.—Abandonment of Lien by Return of Execution.—Consent of Creditor.—Release of Surety.*—Where a judgment is rendered against principals and sureties and an execution against the property of the judgment defendants issued thereon, and the principals have personal property within the jurisdiction of the officer having the writ, on which it might be levied, and the same is returned with the consent of the creditor, although no levy had been made, the sureties are released to the extent of the amount that might have been made by proceeding with the writ, and which can not afterward be made available. *Sterne v. Bank of Vincennes, 549*
4. *Same.—Consideration of Agreement.—Security of Judgment.*—Where the security of a judgment appears to have been the real consideration of an agreement to extend the time of payment of the judgment and withhold execution, and the security has not been given, the trouble and inconvenience of the judgment defendants in procuring sureties to enter themselves as replevin bail do not constitute a sufficient consideration to support the agreement to extend. *Ib.*
5. *Judgment.—Stay of Execution.—Principal and Surety.—Release of Surety.—Agreement.—Lien.*—Where a creditor by judgment against two or more, one of whom is principal debtor and the others are sureties, so adjudged in the cause, causes a return of his execution in consequence

of the entry of replevin bail, which is invalid as such, thereby discharging a lien of the execution on personal property of the principal sufficient to satisfy the judgment, the surety is injured thereby, and he is discharged *pro tanto*. But it is otherwise if the sheriff return the execution of his own accord, or if, in consequence of such invalid replevin bail, the creditor agrees with the principal debtor to a stay and return of execution upon the consent of the original sureties being obtained, and they do consent, though without knowledge that such agreement had been made by the creditor, and no lien on property is lost by the return.

Sterne v. McKinney, 578

Sterne v. Vincennes Nat. Bank, 598

6. *Same*.—*Recognizance for Part of Judgment*.—*Void Execution*.—*Statute Construed*.—A recognizance of replevin bail for less than the whole of a judgment, interest and costs, is not authorized by statute, and is void as such (R. S. 1881, sections 690, 691 and 697). *Ib.*

RES ADJUDICATA.

See DECEDENTS' ESTATES, 1; EVIDENCE, 8; SPECIAL FINDING, 2.

RESCISSION.

See CONTRACT, 4; VENDOR AND PURCHASER.

REVIEW OF JUDGMENT.

See MORTGAGE, 18; PRACTICE, 10, 11.

RULE OF COURT.

See PRACTICE, 4; SUPREME COURT, 8.

SALE.

See DECEDENTS' ESTATES, 9 to 12; MARRIED WOMAN, 5; MORTGAGE, 20 to 22; PARTITION, 1; SHERIFF; SHERIFF'S SALE; STATUTE OF LIMITATIONS, 1 to 3.

SCHOOL LAW.

See CRIMINAL LAW, 2.

1. *Contract*.—*Unlicensed Teacher*.—*Township Trustee*.—A valid contract for the teaching of a public school can not be made by a township trustee with one who at the time has no license to teach, and the subsequent procurement of a license does not validate the contract.
Butler v. Haines, 575
2. *Same*.—*Liability of Township Trustee*.—If a township trustee, contrary to contract, removes a teacher from the charge of a public school, he is not personally liable to the teacher for breach of the contract. *Ib.*

SEDUCTION.

Definition.—Where a man, by promises and persuasions, overcomes the virtue of a woman, it is seduction; but where force is used, or where the woman yields her person to the man, through the promptings of her own lascivious and lecherous desires, there is no seduction.

Johnson v. Holliday, 151

SET-OFF.

Judgment.—*Decedents' Estates*.—T. obtained a judgment of allowance against the estate of S. for the amount of a note. The executors of S. held a note of later date against T., who was insolvent, executed to them in their representative capacity, upon which they obtained judgment. T., having in the mean time assigned his judgment, as collateral security to C., who had notice of all the facts, died.

Held, that the executors of S. might, on motion, obtain a set-off of the judgment held by them against the judgment of allowance made to T.

Carter v. Compton, 37

SHARES OF STOCK.

See CORPORATIONS.

SHERIFF.

Execution.—*Application of Proceeds of Sale of Real Estate.*—*Lien.*—When a sheriff holds several executions against the same party, issued upon judgments which are liens on real estate, the proceeds of sale of such real estate on any of such writs should be applied to the satisfaction of all, in the order of the priority of the liens. *Duke v. Beeson, 24*

SHERIFF'S SALE.

See MORTGAGE, 6; REDEMPTION; STATUTE OF FRAUDS, 3.

1. *Deed.*—*Misdescription.*—*Color of Title.*—*Subrogation.*—*Conveyance.*—Where land sold at sheriff's sale, upon execution, is misdescribed in the levy, return and notice, or, on foreclosure of a mortgage, where the decree is void for want of notice, and the land is misdescribed in the decree and sheriff's deed, the purchaser receiving a sheriff's deed nevertheless takes color of title, which he can convey, and the right of subrogation to the rights of the judgment or mortgage creditors passes to his grantees. *Ray v. Detchen, 56*
2. *Return.*—*Execution.*—*Evidence.*—In an action by a judgment debtor against a judgment creditor, to enforce a sale of real estate, parol evidence, in contradiction of the return of the sheriff on the execution, is inadmissible to show that a sale was made. *Clark v. Shaw, 164*

SIGNATURE.

See MARRIED WOMAN, 3, 4; PROMISSORY NOTE, 10.

SPECIAL FINDING.

See FRAUDULENT CONVEYANCE, 5; VERDICT, 2, 3.

1. *General Finding.*—*Practice.*—Where the record does not show that either party requested the court to make a special finding, the finding will be held to be a general finding only. *Steel v. Grigsby, 184*
2. *Former Adjudication.*—*Verdict.*—*Evidence.*—*Husband and Wife.*—Complaint in two paragraphs to recover for personal injury, loss of service and expenses of care of plaintiff's wife in consequence of an accident caused by a defective alley of the defendant. Answer, 1. General denial. 2. To one paragraph of the complaint a former judgment, in a suit for the same cause, recovered by the plaintiff and wife against the defendant, which has been paid. Reply, 1. General denial. 2. That, on the trial of the former cause, the court excluded all evidence of the expense of nursing and reasonable expenses of curing the wife, upon the objection that those matters were not sufficiently pleaded. General verdict for plaintiff, and a finding upon an interrogatory, that the former judgment was for injury to the plaintiff's horse, wagon and produce alone, but the result of the same accident. *Held*, that the special finding was not within the issues, and did not entitle the defendant to judgment. *City of Indianapolis v. Koltman, 504*

SPECIAL VERDICT.

See VERDICT.

STATUTE CONSTRUED.

See CRIMINAL LAW, 13, 14; DIVORCE, 3, 8, 10; GRAVEL ROAD, 2; JUDGMENT, 1; RAILROAD, 1; REDEMPTION, 1, 2; REPLEVIN BAIL, 6; SUPREME COURT, 3.

STATUTE OF FRAUDS.

1. *Parol Contract.*—*Part Performance.*—The surrender and acceptance of

the possession of land, under and pursuant to a parol contract, constitute such part performance thereof as will take the case out of the statute of frauds. *Arnold v. Stephenson, 126*

2. *Same.—Payment of Purchase-Money.*—Payment of purchase-money for land will not take a parol contract out of the statute. *Id.*
3. *Same.—Sheriff's Sale and Deed.—Title.—Vendor and Purchaser.*—Where the purchaser of land under a parol contract has acquired a perfect title by sheriff's sale and deed and has full possession, the vendor may recover the stipulated price. *Id.*
4. *Contract.—Parol Agreement.*—Where a debtor conveyed land to his creditor upon the parol agreement that the latter should sell the same, and after satisfying the debt out of the proceeds, pay the residue to the debtor, and a sale was accordingly made, the agreement to pay can be enforced, and is not within the statute of frauds. *Humphrey v. Fair, 410*
5. *Same.—Personal Privilege.—Description.*—The correction of mistakes of description in a deed of land is not forbidden by the statute of frauds; and, if it were, the right to plead the statute is personal, and does not belong to a stranger. *Morrison v. Collier, 417*
6. *Contract.—Growing Timber.—Damages.*—Contracts for the sale of growing timber are within the statute of frauds, and to be binding must be in writing. But where A., for a consideration received, agrees without writing to pay B. \$100 in growing timber to be cut from A.'s land, but refuses to permit the timber to be cut, B. has his action, and the sum named is the measure of his recovery. *Terrell v. Frazier, 473*

STATUTE OF LIMITATIONS.

See BASTARDY, 1; FRAUDULENT CONVEYANCE, 8; MORTGAGE, 26.

1. *Guardian's Sale.—Real Estate, Action to Recover.*—All actions brought to recover real estate sold by a guardian upon a judgment specially directing its sale must be brought within five years after the sale is confirmed, unless the party is under disability, and if so the action may be brought within two years after the disability is removed. *White v. Clawson, 188*
2. *Same.—Infancy.—Coverture.—Legal Disabilities.*—One disability can not be connected with another so as to avoid the statute of limitations. If the plaintiff is an infant when the cause of action accrues, the disability of coverture will not extend the time within which an action must be brought. *Id.*
3. *Same.—Title of Purchaser at Guardian's Sale.*—The title of a purchaser at a guardian's sale, who has been in possession for the requisite length of time, is protected by the statute, though the sale through which he claims is void. *Id.*
4. *Municipal Corporations.—Public Rights.—City.*—Municipal corporations, as respects public rights, are not within the ordinary limitation statutes. *Sims v. City of Frankfort, 446*

STREET.

See ADVERSE POSSESSION, 2; CITY; TOWN.

1. *Licensee.—Surrender.—Abandonment.*—A municipal corporation can not surrender the public streets to a mere licensee, nor can it, by failing to improve a part of a street, abandon the right to the part not improved. *Sims v. City of Frankfort, 446*
2. *Same.—Councilman.—Ordinance.*—The consent of a councilman can not affect the force of an ordinance directing the improvement of a street, enacted by the municipal legislature, or give a right to fix the lines of a street and complete an unfinished contract. *Id.*
3. *Same.—Presumption.—Damages.*—The presumption is that a street was

legally laid out and opened, and that property owners damaged thereby claimed and received compensation. *Ib.*

SUBROGATION.

See PRINCIPAL AND SURETY, 3; SHERIFF'S SALE, 1.

SUMMONS.

See DIVORCE, 8; JURISDICTION, 1 to 3; PRACTICE, 18.

SUNDAY.

See CRIMINAL LAW, 12.

SUPREME COURT.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW, 3, 21; DECEDENTS' ESTATES, 2; DIVORCE, 7, 12; JUDGMENT, 11; MASTER COMMISSIONER, 2; NEW TRIAL, 2; PLEADING, 8; PRACTICE, 2, 11, 19; SPECIAL FINDING, 1; VENDOR'S LIEN.

1. *Demurrer*.—A demurrer to a complaint, treated in the court below, without objection, as in a cause, though not entitled as of any cause or court, will be so regarded by the Supreme Court.
Eigenman v. Rockport, etc., Association, 41
2. *Rehearing*.—New questions will not be considered by the Supreme Court on petition for a rehearing.
Johnson v. Jones, 141
3. *Appeal*.—*Suit Originating Before Justice of the Peace*.—Amount in Controversy.—*Dismissal*.—Under section 550 of the code of 1852, as amended by the act of March 14th, 1877 (section 632, R. S. 1881), in actions originating before a justice of the peace, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars, appeals will not lie to the Supreme Court, and, if taken, must be dismissed. This is so, whether the interest accrued before or after the commencement of the action.
Wagner v. Kastner, 162
4. *Damages*.—*Remittitur*.—Where, by reason of a mere error in computation, the damages assessed are excessive, the Supreme Court will affirm the judgment at the costs of the appellee on condition that he remit the excess within a definite period, otherwise the judgment will be reversed.
Pancoat v. Travelers Ins. Co., 172
5. *Practice*.—*Motion to Dismiss*.—*Bill of Exceptions*.—In order to present any question upon the overruling of a motion to dismiss an action, there must be in the record a bill of exceptions.
Long v. Town of Brookston, 183
6. *Same*.—*Demurrer*.—*Record*.—No question is presented in respect to a ruling upon a demurrer, unless the demurrer is in the record. *Ib.*
7. *Practice*.—*Demurrer*.—*Misjoinder of Causes of Action*.—*Complaint*.—*Refusal to Strike Out*.—The Supreme Court will not reverse a judgment for error in sustaining or overruling a demurrer for misjoinder of causes of action, or refusing to strike out parts of the complaint.
Strong v. Taylor School Tp., 209
8. *Brief*.—*Time of Filing*.—*Dismissal*.—On failure by an appellant to file a brief within the time prescribed by Rule 14, the clerk is required to enter an order dismissing the appeal. Such rule applies as well to causes submitted by agreement as to those submitted on call, and as well to those appealed in the term of the trial court as to those appealed in vacation; and the fact, that the appellant has filed a brief since the expiration of the sixty days, is no reason why the appeal should not be dismissed.
Murray v. Williamson, 287
9. *Weight of Evidence*.—The Supreme Court will not disturb a judgment upon the weight of the evidence.
Ryan v. Begeen, 356
10. *Practice*.—*Weight of Evidence*.—Where the evidence in the record tends to sustain the finding of the trial court on every material point, the

Supreme Court will not reverse the judgment on the mere weight of the evidence. *Knowlton v. Mendenhall*, 423

11. *Practice.—Costs.—Cross Error.*—Where the appellant was plaintiff below and upon a cross error it is held that the court below erred in overruling a demurrer to his complaint for want of sufficient facts, the Supreme Court will reverse and remand the cause at his costs, unless it appears that the complaint can not be made good by amendment. *McCole v. Loehr*, 430
12. *Practice.—Judgment.*—No objection to a judgment can be urged in the Supreme Court, that was not made in the court below. *Keiser v. Linea*, 446
13. *Verdict.—Evidence.*—The Supreme Court will not disturb a verdict or decision upon a question of fact, when the evidence is conflicting. *Carter v. Carter*, 466
14. *Practice.—Co-defendant.*—One defendant can not complain, in the Supreme Court, that the name of a co-defendant was stricken from the record by the court below, unless it appears that he was prejudiced thereby. *Dawson v. Wilson*, 485
15. *Same.—Cross Complaint.—Record.*—That a cross complaint was stricken from the record by the court below can not be questioned in the Supreme Court, unless the record shows the ground upon which the court below acted. *Id.*

TAX CERTIFICATE.

See CONTRACT, 2.

TAX LEVY.

See RAILROAD, 2 to 5.

TAX LIST.

See EVIDENCE, 7.

TAXES.

See CONTRACT, 2; CORPORATIONS; DEED, 6; MORTGAGE, 23; RAILROAD.

Injunction.—Contract.—A proper construction of the stipulation, "taxes of 1875 to be paid by owners respectively," contained in a proposition made by L. to M., on the 25th day of March, 1875, to exchange a city block for bank stock, which proposition was accepted, imposed the duty on M. to pay the taxes for 1875 upon the bank stock and precluded him from enjoining their collection. *Morrison v. Wasson*, 477

TEACHER.

See SCHOOL LAW.

TENANTS IN COMMON.

See PARTITION, 3.

TIME.

See BILL OF EXCEPTIONS, 4; CRIMINAL LAW, 14, 15; PRINCIPAL AND SURETY, 2.

TITLE.

See ADVERSE POSSESSION; DECEDENTS' ESTATES, 12, 13; EVIDENCE, 5; JUSTICE OF THE PEACE, 2, 3; MORTGAGE, 5, 9; PLEADING, 9; SHERIFF'S SALE, 1; STATUTE OF FRAUDS, 3; STATUTE OF LIMITATIONS; TRESPASS; VENDOR AND PURCHASER; WILL, 2.

TITLE, ACTION TO QUIET.

See PLEADING, 9.

TOWN.

See PRACTICE, 5.

1. *Contract.—Grading Street.—Trustees of Town.—Complaint.*—A complaint by a contractor against a property owner, to recover an assessment

made against him by the trustees of a town for grading the street whereon his property abuts, must be founded upon a written contract and set forth the original or a copy thereof. *Budd v. Kraus, 137*

2. *Same.—Bond.—Copy.*—In such case a copy of the contractor's bond is not a sufficient substitute. *Ib.*
3. *Same.—Presumption.—Parol.*—A contract not appearing to be in writing must be presumed to be by parol. *Ib.*
4. *Same.—Estoppel.—Silence.*—Mere silence of a property owner having knowledge that work was being done, and failing to object and prevent it by injunction, will not estop him to contest an assessment against him, made without any contract. *Ib.*
5. *Same.—Work Accepted.—Trustees.*—In such case the contractor can not be heard to allege that the property owner received and accepted the grade. The trustees of the town alone could do that. *Ib.*

TOWNSHIP TRUSTEE.

See SCHOOL LAW.

1. *Liability for Township Funds.—Ownership.*—When a township trustee receives money belonging to his township, he becomes technically the owner thereof, and only indebted to the township for the amount received. He is responsible to the township for such money to the same extent that a banker is for money deposited with him on general account, and hence is responsible to a much greater extent than if he were the mere agent, bailee or trustee of the township for the safe-keeping and disbursement of a specific fund. *Bocard v. State, ex rel., 270*
2. *Same.—Conversion.—Liability on Bond.*—A mere conversion of money received by a township trustee to his own use does not, of itself, amount to a breach of his bond; there must also be, as connected therewith or resulting therefrom, a failure on his part to pay out the money for which he is responsible, according to law, or to deliver it to his successor at the expiration of his term of office. *Ib.*
3. *Same.—Failure to Make Report.*—The failure of a township trustee to make an annual report of the receipts and expenditures of his township does not render him liable on his bond, unless some injury resulted to the township or other party interested by reason of such failure. *Ib.*
4. *Same.—Evidence.—Admissions as against Sureties.*—In an action upon the bond of a township trustee as against his sureties, the admissions or declarations of the township trustee, which are not a part of the *res gestæ*, and made after the alleged breach of the bond, are inadmissible. *Ib.*
5. *Receipt.—Deficit.—Defalcation.*—An incoming township trustee can not absolve his predecessor from liability for money in his hands, so as to prevent the township from maintaining an action for it, by falsely charging himself with such funds and by falsely receipting to his predecessor for the amount of his deficit. *State, ex rel., v. Haynes, 294*
6. *Same.—Settlement.—Fraud.—Receipt.*—In such case, an alleged settlement of his deficit with the board of commissioners, by the use of a receipt procured from his successor by a gross and inexcusable fraud, constitutes no defence against an action by the township. *Ib.*
7. *Same.—Sureties.—Township.*—A township trustee can not bind his sureties, or conclude the township, for money not actually received from his predecessor, but receipted for by him upon his representation that it was a long standing deficit and had been receipted for as such by himself and his predecessors. *Query.*—In such case, is the incoming trustee himself concluded by his false receipt fraudulently procured,

and by his report to the board of commissioners charging himself with the amount? *Ib.*

TREES.

See STATUTE OF FRAUDS, 6.

TRESPASS.

See DECEDENTS' ESTATES, 15.

1. *Answer of Title and Possession in Another.*—In an action for trespass on land, it is a good answer that the plaintiff had conveyed and given possession of the land to another, by whose authority the defendants did the acts complained of, the copy of the deed referred to being unnecessary and immaterial. *Carter v. Branson, 14*
2. *Same.—Conveyance.—Re-entry.*—The grantor in a conveyance upon a condition subsequent, after condition broken, must have re-entered and had possession at the time of an alleged trespass upon the land, in order to be entitled to an action therefor. *Ib.*
3. *Same.—Grantor and Grantee.*—The mere assertion of ownership or control by a grantor, after breach of a condition subsequent in his deed, the grantee being still in the actual possession, does not constitute a re-entry and recovery of possession so as to enable the grantor to maintain an action of trespass. *Ib.*

TRIAL.

See HIGHWAY, 3.

TRUST AND TRUSTEE.

See PRINCIPAL AND SURETY, 6.

UNITED STATES DISTRICT COURT.

See EVIDENCE, 1.

USURY.

See INTEREST.

VARIANCE.

See PLEADING, 3.

VENDOR AND PURCHASER.

See EVIDENCE, 5; FRAUDULENT CONVEYANCE; JUDGMENT, 7; MARRIED WOMAN, 2 to 4; MISTAKE; MORTGAGE, 1, 4; NOTICE; PARTITION, 2; RECEIVER; STATUTE OF FRAUDS, 2 to 4.

1. *Vendor and Vendee.—Fraud.—Known Facts.—Rescission.*—A vendee who accepts a deed knowing that an inchoate interest of a wife in the property has not been extinguished, and takes an agreement from the vendor to adjust and extinguish that interest, or to credit a sum upon the last instalment of the purchase price, can not claim that he was deceived as to his vendor's capacity to convey that interest, nor on account of it resist payment of the earlier instalments of the purchase-money. A vendee, who has taken and holds undisturbed possession under his deed, can not resist the payment of purchase-money on account of defects in the title or outstanding interests, unless he has been compelled to buy in such interests or has suffered substantial injury on account thereof. *Stetser v. LaRose, 435*
2. *Same.—Rents and Profits.*—The vendee, who has been in possession of improved property, can not rescind without offering to reconvey and to account for rents and profits, or the value of the use. *Ib.*

VENDOR'S LIEN.

See PRINCIPAL AND SURETY, 7; RECEIVER.

Foreclosure.—Practice.—Harmless Error.—A decree of foreclosure of a ven-

dor's lien should require that the vendee's personal property be first exhausted, but, if this is omitted without objection or exception, the error will not be available on appeal. *Stelzer v. LaRose*, 435

VENIRE DE NOVO.

See FRAUDULENT CONVEYANCE, 4; VERDICT, 3.

VERDICT.

See CRIMINAL LAW, 10; FRAUDULENT CONVEYANCE, 4; NEGLIGENCE, 4; PRACTICE, 9, 13, 20; PROMISSORY NOTE, 8; SPECIAL FINDING, 2; SUPREME COURT, 13.

1. *Special and General Verdict.*—A specific verdict returned without request of either party for a special verdict, or for answers to interrogatories, can be regarded as a general verdict only. *Strong v. Taylor Tp.*, 208
2. *Special Verdict.*—*Special Finding.*—*New Trial.*—Where a special verdict does not find upon material facts established by the evidence, the remedy is by a motion for a new trial; and where a special finding or a special verdict is silent upon a point, it is equivalent to a finding upon that point against the party who has the burden of the issue; and if the point is sustained by the evidence, the finding is wrong and the party injured is entitled to a new trial. *Spraker v. Armstrong*, 577
3. *Same.*—*Venire de Novo.*—The office of a special verdict or a special finding is to find the facts which have been proved, but the failure to find these facts is not a defect on the face of the finding or verdict to be reached by a motion for a *venire de novo*. But where such verdict or finding is on its face defective or imperfect, a motion for a *venire de novo* is proper. *Ib.*

VOLUNTARY PAYMENT.

See COSTS, 4.

WAIVER.

See PLEADING, 8; PRACTICE, 20.

WARRANT.

See BASTARDY, 1.

WAY.

See EASEMENT.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 9, 10, 13.

WILL.

See DECEDENTS' ESTATES, 10 to 14.

1. *Residuary Devise.*—*Lapsed Legacy or Devise.*—In this State, there is no distinction between a void or lapsed legacy or bequest of personal estate, and a void or lapsed devise of real estate. But a void or lapsed devise of real estate, like a void or lapsed legacy, goes into the residuum and passes, under the residuary clause of the will, to the surviving residuary devisees and the descendants of such of them as have died leaving descendants, to the exclusion of the testator's heirs, who are not named in such residuary clause. *Holbrook v. McCleary*, 167
2. *Construction.*—*Title to Real Estate.*—A testator devised his farm and certain property to his wife for life, and "at her death the farm to belong to my son Thomas J.," together with certain personal property. After certain other specific devises and bequests, the will proceeded: "and the balance of my ——— is to be sold and turned into money, and debts owing to me collected and then put to interest to educate my daughters and son Thomas J. equally, and the principal is to be divided

in the following manner: my son Thomas J. is to have two shares, and each of the girls one share; if any of the last named seven daughters or my son Thomas J. should die before they come of age, then their part is to be divided among the other seven."

Held, that Thomas J. took the farm absolutely in fee simple, though he died before reaching his majority. *Patterson v. Nixon*, 251

3. *Description of Real Estate.—Parol Evidence.*—In an action to recover real estate claimed under a devise by the description: "Part of the donation lot number 158, in township number 3 north, of range number 8 west, containing 200 acres," parol evidence was properly admitted to identify the land sued for with the land devised, and to show that the testator died seized of it and of no other part of donation lot No. 158. In such case, the devise was not void for uncertainty of description of the land. *Cruse v. Cunningham*, 402

4. *Devise.—Descent.—Remainder-Man.—Heirs.*—Real estate was devised to the wife of the testator for life, remainder in fee to his children. The wife and children, after his death, united in a joint sale and conveyance of the land to a purchaser, notes and mortgage for the purchase-money being taken in the name of the wife, and finally invested in other lands, title to which was taken in her name.

Held, that upon her death these latter lands went, in equity, to the remainder-men under the will of her husband, and not to her heirs at law, precisely as the estate devised would have gone if it had not been conveyed.

Held, also, that other real estate, purchased by the widow with means derived from the annual profits of the real estate devised, and from the revenue of the avails thereof, descended, on her death, to her heirs at law. *Clifford v. Farmer*, 529

5. *Real Estate Charged With Payment of Debts.*—Real estate devised by will and charged with the payment of the debts of the testator, may be sold by his personal representative, under an order of the court, if the personal estate be insufficient to pay the debts. *Bennett v. Gaddis*, 347
6. *Conveyance.*—A will is not revoked by an invalid conveyance subsequently made by the testator. *Id.*

WITNESS.

See BASTARDY, 2; BUILDING ASSOCIATION; CRIMINAL LAW, 2; NEGLIGENCE, 5; PRACTICE, 1.

1. *Impeachment and Corroboration by His Own Statements.*—A witness, whose testimony has been assailed by evidence of his inconsistent statements, may be supported by proof of his declarations made in harmony with his testimony; but he can not be thus corroborated simply because his testimony has been contradicted by other direct evidence. *Carter v. Carter*, 466
2. *Discretion of Court.—Practice.*—It is no abuse of discretion for the judge, after a witness has been examined by the parties, to interrogate him concerning the state of his feelings towards the party against whom he has testified. *Lefever v. Johnson*, 554

WORK OF NECESSITY.

See CRIMINAL LAW, 12.

WRITTEN INSTRUMENT.

See CONTRACT, 2; EVIDENCE, 4; PLEADING, 3.

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